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IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D.,
et al.,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO
COMPANY, et al.,

Defendants.
_____/

Miami-Dade County Courthouse
Miami, Florida
Wednesday, 1:30 p.m.
March 17, 1999

TRIAL - VOLUME 255

The above-styled cause came on for trial before the Honorable Robert Paul Kaye, Circuit Judge, pursuant to notice.

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APPEARANCES:

STANLEY M. ROSENBLATT, ESQ.
SUSAN ROSENBLATT, ESQ.
On behalf of Plaintiffs

DECHERT PRICE & RHOADS
ROBERT C. HEIM, ESQ.
SEAN P. WAJERT, ESQ.
On behalf of Defendant Philip Morris

COLL DAVIDSON CARTER SMITH SALTER & BARKETT
NORMAN A. COLL, ESQ.
On behalf of Defendant Philip Morris

ZACK KOSNITZKY
STEPHEN N. ZACK, ESQ.
On behalf of Defendant Philip Morris

CARLTON FIELDS WARD EMMANUEL SMITH & CUTLER
R. BENJAMINE REID, ESQ.
On behalf of Defendant R.J. Reynolds

JONES, DAY, REAVIS & POGUE
RICHARD M. KIRBY, ESQ.
On behalf of Defendant R.J. Reynolds

KING & SPALDING
MICHAEL RUSS, ESQ.
RICHARD A. SCHNEIDER, ESQ.
On behalf of Defendant Brown & Williamson

CLARKE SILVERGLATE WILLIAMS & MONTGOMERY
KELLY ANNE LUTHER, ESQ.
On behalf of Defendants Liggett Group
and Brooke Group

SHOOK HARDY & BACON
EDWARD A. MOSS, ESQ.
WILLIAM P. GERAGHTY, ESQ.
On behalf of Defendant Brown & Williamson
JAMES T. NEWSOM, ESQ.
On behalf of Defendant Lorillard

DEBEVOISE & PLIMPTON
ANNE COHEN, ESQ.
JOSEPH R. MOODHE, ESQ.
On behalf of Defendant The Council for Tobacco Research

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(APPEARANCES - Continued)

GREENBERG TRAURIG HOFFMAN LIPOFF ROSEN & QUENTEL
DAVID L. ROSS, ESQ.
On behalf of Defendant Lorillard

MARTINEZ & GUTIERREZ
JOSE MARTINEZ, ESQ.
On behalf of Defendant Dosal Tobacco Corp.
and Tobacco Institute

KASOWITZ BENSON TORRES & FRIEDMAN
AARON MARKS, ESQ.
NANCY STRAUB, ESQ.
On behalf of Defendants Liggett Group
and Brooke Group

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(Whereupon, the following proceedings were had:)

THE COURT: Okay. Shall we resume the questioning or does anyone want to take up that issue?

MR. HEIM: We might as well resume it, Your Honor. The memo did come over.

THE COURT: We'll wait until later.

MR. HEIM: It had a mistake in it. I sent it back to be corrected, rather than give it to you with a mistake.

THE COURT: All right. Let's continue with the jury, then, please.

(The jurors entered the courtroom.)

THE COURT: All right. Have a seat, folks. I believe we're ready for cross?

MR. ROSENBLATT: Yes, Your Honor.

THE COURT: Okay.

CROSS EXAMINATION

OF ALEXANDER SPEARS, PH.D.

MR. ROSENBLATT: Good afternoon, ladies and gentlemen.

THE JURORS: Good afternoon.

BY MR. ROSENBLATT:

Q. Good afternoon, Dr. Spears.

A. Good afternoon.

Q. Now, I noticed that when you were introduced,

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you identified yourself as chairman of the board. Are you still the CEO of Lorillard?

A. No. As of January 1, I'm just chairman of the board.

Q. Okay. So who is the CEO now of Lorillard?

A. Martin Orlowsky.

Q. Martin Orlowsky. What about Andrew Tisch? Is he still involved with the company?

A. Not involved with Lorillard Tobacco Company.

Q. And Andrew Tisch was the president and CEO of Lorillard Tobacco Company from when to when?

A. I would say about 1990, 1995.

Q. From about '90 to '95?

A. Yes.

Q. Okay. When the various CEOs from all the companies testified in front of the Waxman Committee in front of Congress in April of '94, at that time Andrew Tisch spoke on behalf of Lorillard, correct?

A. As CEO of Lorillard.

Q. As CEO of Lorillard. Okay.

Let me ask you a few questions about your curriculum vitae. As a matter of fact, you got your Ph.D. in Buffalo, so that's a city you're familiar with?

A. Yes, I'm familiar with it.

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Q. Buffalo, New York?

A. It was 40 years ago, but I was familiar at that time.

Q. And I think in that context you mentioned your familiarity with a very famous institution in Buffalo, the Roswell Park Cancer Institute, correct?

A. That's correct.

Q. Okay. I think you had done some work there at one time?

A. In my graduate work, part of the program was in conjunction with investigators at Roswell Park.

Q. My understanding is that Roswell Park is the oldest cancer research institute in the country. Do you know one way or the other?

A. I do not.

Q. You would agree that it is a prestigious, well-recognized cancer institute, Roswell Park?

A. Yes. Yes.

Q. You know, in looking at your curriculum vitae and in going through the various -- obviously you've had a 40-year career there. At certain times you refer to your employment with P. Lorillard company, and then as we get more recent, you say Lorillard, a Division of Loews Theaters Inc.?

What is the relationship between Loews

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Theaters, Incorporated and the Lorillard Tobacco Company?

A. I can't give you the exact dates, but Loews acquired Lorillard in about 1968. Prior to that time, it was known as Lorillard Corporation, and when I joined the company it was P. Lorillard Company.

Since the Loews' acquisition, we were first known as Lorillard, a Division of Loews Theaters, and I would think maybe eight or nine, ten years ago, we became Lorillard Tobacco Company.

Q. Is there still a relationship with Loews Theaters?

A. No. Loews Theaters is gone.

Q. Now, in looking at Page 2 of your CV, talking about various activities, you mentioned testimony before the Federal Trade Commission regarding development of a method for tar and nicotine determination, 1966. That surprised me. I didn't think it was that long ago. Is that accurate, 1966?

A. I believe it's accurate.

Q. Okay. And then you mentioned testimony before the United States Senate Subcommittee on Health and Environment of the Committee on Energy and Commerce for its hearing, and that was in 1983.

Now, you don't mention your testimony before

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the Waxman Committee, the House of Representatives. What year did you testify before that committee?

A. I believe that's '94. '93, '94.

Q. And then you mention that you are a member of the board of directors, the Council for Tobacco Research USA, Incorporated, from 1990 to the present.

A. Correct.

Q. So, even as chairman of the board of directors, you are still a member of the board of directors of the Council for Tobacco Research, to this day?

A. Yes.

Q. Okay. Did you know Addison Yeaman?

A. I knew him. Not well, but I knew him.

Q. Okay. You know that he at one time was president and CEO of the Council for Tobacco Research, right?

A. That's correct.

Q. Did you know Mr. Gertenbach?

A. Yes, I did.

Q. Who at one time was president and CEO of the Council for Tobacco Research, correct?

A. No, I don't think that's correct. He was president but --

Q. Not CEO?

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A. I don't believe so.

Q. Okay.

Now, in looking at some of your publications on your curriculum vitae, one -- well, this -- I don't know. Is this a publication? Because it seems to be a presentation you made: A combined approach to the quantitative analysis of the volatile components of cigarette smoke, 18th Tobacco Chemists Research Conference in Raleigh, North Carolina in 1964.

A. That would have been a presentation at a scientific meeting.

Q. Okay, as opposed to an actual publication which appeared in a journal sometime?

A. That's correct.

Q. Okay. What were the volatile components of cigarette smoke that you were referring to?

A. Well, as I explained earlier, the method of collecting cigarette smoke and collecting tar is such that the gas phase or vapor phase components pass through a filter, which collects all of the aerosol particles.

And this presentation had to do with the analysis of the components that were in that vapor phase or that part that passed through the filter that collected the aerosol particles.

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Q. Okay. Let me just mention to you a couple -- a few of the other either articles or presentations, and then ask you a question collectively about them.

The determination of saturated hydrocarbons in cigarette smoke condensate -- and that was at a tobacco chemists research conference -- quantitative determination of alkanes, A-L-K-A-N-E-S, in cigarette smoke, quantitative determination of phenol in cigarette smoke.

Now, hydrocarbons, are they carcinogens?

A. Depends on which hydrocarbons. But --

Q. Some are?

A. Some types of hydrocarbons are.

Q. Okay. How about alkanes? Are they carcinogens?

A. Not to my knowledge.

Q. And it seems like you did several papers or -- and/or presentations on phenols. What was your interest in phenols?

A. They were thought to be active in terms of effecting a result on mouse skin. They're referred to as promotors.

Q. Promotors of tumors?

A. Promotors in a process that led to tumors, yes.

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Q. Okay.

A. And that was some of the interest in terms of those components.

They also were thought to have some role in the flavor characteristics of tobacco smoke.

Q. Phenols are considered carcinogenic?

A. No. At least not the phenols that we were talking about there.

Q. And on the last page of your curriculum vitae, which is Page 7, an article: Factors Involved in the Ignition of Cellulosic Upholstery Fabrics by Cigarettes, and then some other articles about upholstery, and you did some articles which appeared in the Journal of Fire Sciences.

What was the focus of those articles?

A. They relate to investigations that we had in our laboratories relating to the propensity of soft furnishings to be ignited by cigarettes.

Q. To catch fire?

A. Yes. And this was -- I think you referred to it earlier in the 1982 or '3 testimony before the Waxman hearing. That was the hearing that had to do with cigarette propensity to cause fires. And out of that came a bill which authorized research in that field by the Consumer Products Safety Commission and

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the National Institute for Standards in Technology.

Q. Who is today the head of research and development at Lorillard? And I guess asked another way: Who is the top scientist at Lorillard?

A. Dr. Christopher Coggins.

Q. And how long has Dr. Coggins occupied that position?

A. He has been in the senior position I think for about two years.

Q. He's a Ph.D.?

A. He's a Ph.D. in toxicology.

Q. Now, I'm sure you know, in business, people have various titles which do not necessarily reflect the level of their involvement in running a particular company.

For example, do I understand correctly that with Mr. Orlowsky being the CEO of Lorillard, that as a practical matter he is the hands-on person running the company on a day-to-day basis?

A. He would be today, yes.

Q. Okay. And as chairman of the board, how actively involved are you?

A. Mr. Orlowsky reports to me, and I probably have been in the office since the first of the year every day except one or two.

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Q. Okay. But is it fair to say that in distinguishing between your two positions, you are essentially, as chairman of the board, a policy person, setting the broad policy of the company, and Orlowsky is more the hands-on person running the company?

A. I think that's a fair summary of it, yes.

Q. Okay. And of course, when you were CEO, you were the hands-on person --

A. And the policy maker.

Q. And the policy maker?

A. Correct.

Q. You mentioned in an answer to Mr. Ross that Lorillard had 9.4 percent of the tobacco market?

A. Domestic market, yeah.

Q. Domestic market.

In how many other countries does Lorillard operate outside the United States?

A. Nine (sic), except some of the provinces: Puerto Rico, for example, Guam, Virgin Islands.

Q. How many billions --

THE COURT: Can I stop one second? I heard the answer to be none. Or nine?

THE WITNESS: None. Zero.

THE COURT: The record should be corrected.

BY MR. ROSENBLATT:

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Q. My question is, when you say 9.4 of the domestic market, how does that translate into billions of cigarettes sold by Lorillard in America?

A. In 1998?

Q. Yes.

A. About 42 and a half billion.

Q. 42 and a half billion. And you say Philip Morris has about 50 percent of the market?

A. That's correct.

Q. Philip Morris has as much of the market as Reynolds, Brown & Williamson and Lorillard combined?

A. Correct.

Q. And as I understand it, Lorillard's best seller by far is Newport?

A. I don't know what you mean "by far," but it's our best seller.

Q. Okay. And then Kent is number two in the Lorillard context?

A. It's close, but it's either number two or close to number two in 1998.

Q. And True is right up there with Kent?

A. True is substantially less than Kent.

Q. This board that you and Mr. Ross were talking about, the Tobacco Working Group board, with public health people, people from the scientific community,

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and people from the tobacco industry, now, the jury -- members of the jury have heard the names and they've seen documents with nearly all of these people: Seligman and Senkus, and here you are, and Dr. Helmut Wakeham.

And I guess basically, at that point in time, they were the top research and development people on behalf of the tobacco industry meeting with these other scientists, correct?

A. They were the top research people in their respective companies at the time.

Q. Okay. To your knowledge, Dr. Spears, is any one from the public health list, does anyone from the scientific community list, these very prestigious people, many of them M.D.s, are any of them, to your knowledge, going to come into this courtroom and say what the tobacco executives say: That causation has not yet been scientifically proven and we don't know if cigarette smoking causes cancer?

MR. HEIM: Objection, Your Honor. Calls for speculation.

MR. ROSS: Objection.

THE COURT: Well, yes, it may, unless he has direct personal knowledge of what they're going to say or not say.

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A. I don't know that any will be here, and if they were, I don't know what they would say.

Q. Now, I believe you had said -- by the way, I know you said that the Tobacco Working Group ended in 1977?

A. That's correct.

Q. When did it start?

A. 1968.

Q. So it was in existence for nine years?

A. That's correct.

Q. And how often did you people -- by the way, when there was a meeting, are you telling us that basically all of these people attended?

A. No.

Q. Tell me how that worked.

A. Well, some of these people -- these are all the people that were in the group, Tobacco Working Group, at one time or another. I indicated that Steinfeld, for example, was I think only there for the first meeting. So some came on at later points in time.

I can't recall any that actually left during the period who came on initially, other than some from the tobacco industry, where they may have retired and somebody else replaced them.

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I believe the rest came on sometime during the period and stayed on until the end.

Q. Okay. But when there was in fact a meeting, how many people would ordinarily meet?

A. Oh, there might be 15 or so members of this group, 20, 15 or 20.

Q. Were there regularly-scheduled meetings?

A. Yes.

Q. How frequently?

A. They were very frequent in the beginning. Most of them were two-day meetings, and they were monthly, when it started out.

Q. Held where?

A. At the National Cancer Institute.

Q. In D.C., Washington, D.C.?

A. In Bethesda, Maryland.

Q. Which is a suburb very close to Washington, D.C., right?

A. Yes. It's a suburb of Washington.

Q. So, you've told us that the number one public health official in the country at the time of the formation of this group, Dr. Jesse Steinfeld, who was the Surgeon General of the United States, attended one meeting, and he never returned?

A. I wouldn't characterize him as the number one

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health official in the United States.

Q. Okay. Let's not quibble about that. He was the Surgeon General?

A. He was the Surgeon General.

Q. He was the Surgeon General of the United States, and I believe you told us he attended one meeting and never returned, correct?

A. I believe that's correct.

Q. Do you know why he never returned?

A. I believe he was no longer Surgeon General after a few times. His assistant or assistant surgeon general was listed there as Ian Mitchell, who did attend after that as representing that office.

Q. Didn't Dr. Steinfeld, the Surgeon General of the United States, reach precisely the same conclusion nine years earlier that the new director of the NIH reached in 1977, when he essentially disbanded the group as being nonproductive?

MR. ROSS: Objection. Calls for speculation.

A. Not to my knowledge.

THE COURT: Overruled.

A. (Continuing) The presentation that -- his discussion in the meeting that I attended with him, he was very positive on the activity of this group.

Q. Now, you've told us that the goal of the

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Tobacco Working Group, the nine-year goal of the Tobacco Working Group, was to make a less hazardous cigarette, correct?

A. Or to provide the direction that would lead to a less hazardous cigarette.

Q. Did they succeed?

A. I've indicated that I do not believe they did.

Q. You would agree, would you not, that if the goal of an organization is to create a less hazardous cigarette, this presumes that the existing cigarettes are hazardous?

A. That was a presumption of the program, yes.

Q. And it was a presumption that you didn't agree with back then, and you don't agree with today, correct?

A. I did not agree with it then, and today I've indicated that I don't believe that it's been proven scientifically that cigarette smoking is a hazard with respect to lung cancer. And this was initially restricted to lung cancer.

Q. How many carcinogens are there in tobacco smoke, which have been identified?

For example, on one of the charts you were talking about smoke chemistry, so my question is, how

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many carcinogens are there in tobacco smoke?

A. I think the number that's been reported by others is in the neighborhood of, oh, say 40 -- between 40 and 50. These, of course, are dependent on the concentrations that are applied, as to whether they are carcinogen; also dependent on the animal that's used and so forth.

Q. How many -- and you're a chemist -- how many compounds have been identified in tobacco smoke as of today?

A. That's a little difficult to answer because compounds are identified with different degrees of rigor. So you might call some clearly identified; others partially identified, or all the confirmations are not there. But on the order of I think four to five thousand have been reported in the literature.

Q. About four to five thousand?

A. Yes.

Q. Now, Dr. Spears, you have testified in other tobacco trials, have you not?

A. Yes, I have.

Q. Did you testify in the Ohio case, the union case?

A. No, I did not.

Q. Dr. Spears, in your review of the history of

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the research department of Lorillard, would you not agree that there were no medical doctors, no physicians, ever employed in the research department in the '50s at Lorillard, in the 1950s?

A. That's correct. But we had consultants who were in these, working with us.

Q. But not full-time employees of Lorillard?

A. That's correct.

Q. These were independent consultants?

A. These were Dr. Dolhamn, Dr. Rylander, BAT M.D.s.

Q. Do you recall -- now, Kent came out with a very famous -- by the way, was Kent the first cigarette product in this country to use a filter, or was there an earlier product which used a filter?

A. There were earlier products, but the filters were very inefficient in terms of removal of the aerosol particles. I would say Kent was the first cigarette to employ a filter that was highly efficient in removal of the aerosol or tar.

Q. And what year -- and it was called the micronite filter?

A. That was the coined trademark for that filter, yes.

Q. And that was the advertising phrase?

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A. That trademark was used in the advertising.
Q. Kent with the micronite filter?
A. That's correct.
Q. Okay. Micronite being what?
A. I believe it's a combination of two words "micro" and "micron," in that the aerosol particles of the cigarettes are measured in microns in length, which are micrometers. So it's a very small number. And it's a word coined from that, I believe.
Q. And Dr. Spears, when Kent was being advertised by Lorillard in the 1950s, it was advertised as giving greater protection than any other cigarette; do you recall that?
A. There were some ads that made that statement, yes.
Q. And many of those ads were taken out in medical journals, correct?
A. Some were at the time.
Q. And in the medical journals, some of the advertisements contained the language that: No other cigarette will afford your patients, especially those who are sensitive to nicotine and tars in tobacco, such a degree of filter effectiveness?
MR. ROSS: Objection, Your Honor. This is beyond the scope of direct, number one; number two, it

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was covered --

MR. ROSENBLATT: Well, if we're going to have speaking --

THE COURT: Then speak over here.

(The following proceedings were had at sidebar:)

MR. ROSS: Your Honor, these questions are beyond the scope of direct examination. Dr. Spears testified absolutely nothing about advertising. We never went into the subject.

Secondly, Your Honor, micronite filter ads were specifically covered by Mr. Rosenblatt in the videotaped deposition of Dr. Spears that was already played to the jury. Here we are, right here.

This was played to the jury, asking him about the micronite filter ads: Weren't those filters advertised as the greatest health protection ever developed for smokers back in the 1950s?

Virtually the exact question he's now asking. He's virtually covering the same ground we didn't cover in direct. We didn't go back into these subjects because this witness has already been cross examined on these subjects, and we haven't opened up any further cross examination on this subject.

MR. ROSENBLATT: This subject was covered.

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It's involved with low-delivery cigarettes in his chart. He's talking about general reduction, selective reduction.

You know, you can't put on a witness like this and cover these broad general subjects and then try to say something was not covered. It was encompassed within their charts, within their testimony. And the deposition he's referring to, the deposition was taken like four or five years ago.

MR. ROSS: He asked him the identical questions right here about the Kent micronite filter ads. He didn't testify anything about advertising.

I have no objection to him asking questions about general reduction or specific reduction of tar and nicotine. That's what he testified about. But he didn't say a word about advertising or what was advertised, and the subject has already been played to the jury.

It's not fair, when we bring a witness, to let him go and ask the same questions again. Here is the exact question: Weren't those filters advertised as the greatest health protection for smokers?

This deposition was taken in 1997.

MR. NEWSOM: Not four or five years ago.

MS. ROSENBLATT: He also testified about the

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research that was done over the years by Lorillard, going back to the '50s.

Now, the follow-up question is going to be: Representations were made. Well, what research was conducted by Lorillard to back up these representations at the time? That's -- but that was on direct today.

MR. ROSS: And he asked him: Were the representation -- here is the question: That was true, wasn't it?

He's already testified that the data to support the statement was true. These are the very statements we covered. It was played to the jury. It was a video deposition.

MS. ROSENBLATT: I think we cannot expect the jury to recall several months earlier.

THE COURT: Well, the point being, you already crossed. They did get into a generalized area, generally speaking, of this whole subject matter, as to what all this meant. You're getting into a little bit more specific area. I don't know.

How much are you going to get into that type of subject matter?

MR. ROSENBLATT: Not much.

MR. MOSS: Just a little.

MR. ROSS: We certainly object to asking

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virtually the identical -- I'm concerned that this is going to continue to happen, you know, and that's the problem when they've played a deposition of a witness. We've brought a witness here and tried to keep his testimony to certain specific areas, advertising and advertising --

THE COURT: Gentlemen, if you had made the witness available to him in the first place, he wouldn't have had to read the depo.

MR. ROSS: We made him available. Your Honor, they took his deposition.

MS. ROSENBLATT: Not on our case.

MR. ROSS: We made him available.

MR. ROSENBLATT: You never made a commitment that you were calling him in your case. I said many times in open court that if I had a commitment that you were definitely calling a given CEO, I would --

MR. NEWSOM: That was in Broin.

MR. ROSS: That was in Broin, not in this case. No proposal was ever made.

The point is, to ask these questions in front of the jury and he's played them --

THE COURT: A little different tact here. He's on cross and I think he's entitled to get into it.

MR. MOSS: Before we leave, Your Honor, a

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couple of weeks ago, told Mr. Rosenblatt not to mention other cases, and you know, he snuck in the union case, which was the very reason that Your Honor told him not to, and I'm just reminding. I hope you'll remind him not to do it.

MR. ROSENBLATT: There is never an objection by Mr. Moss that's not personalized. Either against Susan or me. Fine.

Now, the background of that is that the witness yesterday brought up on his own -- I said: How long have you been in Miami? He said: Well, I came from Acron, Ohio, where I testified.

So that is a totally changed circumstance --

MR. MOSS: Wrong, wrong.

MR. ROSENBLATT: -- as far as I am concerned.

MR. MOSS: I don't care about Acron and I don't care about the Ohio case. Your Honor said don't talk about the Union case. The witness didn't talk about it.

THE COURT: Okay. Under normal circumstances, if you talk to your expert, it's fair game to ask him how many times he's testified, where he's testified and so forth. This is a witness who is basically not an expert or being presented as an expert, but merely as a spokesman for the party. So it

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may make somewhat of a difference as to his credibility.

MR. HEIM: Your Honor, the point Mr. Moss is making --

THE COURT: I would most generally say that asking a nonexpert about prior testimony would be a no-no, which really shouldn't be gotten into.

If he's an expert being put on as an expert, you can test his credibility and background as far as prior testimony is concerned.

MR. MOSS: But the point -- go ahead.

MR. HEIM: The point that Mr. Moss is trying to make is that where it is appropriate to ask about another case, we would ask that it simply be referred to as "the Ohio case," rather than pointing out to a jury that a union is another plaintiff.

MR. MOSS: That's what you told him.

MR. HEIM: It wasn't necessary to say that.

THE COURT: In this case I agree with you. It wasn't necessary. I sustain the objection on that.

So go ahead. Overrule the objection as to this question, and sustain the objection as to prior testimony in the Ohio case.

MS. ROSENBLATT: I just wanted to mention over here that I did receive confirmation that the

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article in JAMA was peer-reviewed.

THE COURT: That's nice.

MS. ROSENBLATT: I had called. That became an issue earlier, and they said that it was. We checked with the editorial staff of JAMA.

THE COURT: Tell that to Mr. Kirby. He will be interested.

MR. NEWSOM: There's still no proof of that.

MR. HEIM: JAMA is a magazine.

THE COURT: Still doesn't help me.

(The sidebar conference was concluded, and the following proceedings were held in open court:)

BY MR. ROSENBLATT:

Q. Dr. Spears, let me go back to my earlier question. Which was:

In terms of advertising by Lorillard in medical journals of the Kent cigarette with the micronite filter, among the language used was that: No other cigarette will afford your patients, especially those who are sensitive to nicotine and tars in tobacco, such a degree of filter effectiveness.

MR. ROSS: Your Honor, if he's got a document, I would ask that he give the witness a copy of it.

MR. ROSENBLATT: I don't have a document.

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I'm looking at something private.

THE COURT: Okay. Overruled.

A. I don't know that those are the precise words. I don't know.

Q. Well, I'll tell you exactly what I was looking at. I was looking at testimony you gave, not in this case but in another case, on August 14, 1996. Let me show -- I'll show Mr. Ross the style and I'm on Page 308.

MR. ROSS: Stanley, they need to see the front of it so they know which one you're talking about.

MR. ROSENBLATT: Can I show it to the witness so he'll know what I'm talking about?

THE COURT: Sure.

MR. ROSENBLATT: So you've got it?

MR. ROSS: What was the page?

MR. ROSENBLATT: 308 -- well, no. Page 309.

BY MR. ROSENBLATT:

Q. Dr. Spears, your counsel has the earlier testimony in front of him. Let me begin on Line 5:

And the advertisements I just mentioned were directed, among others, to doctors, weren't they? They were advertised in doctors' journals, doctors' magazines?

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Answer: They advertised in some of the medical journals, yes.

Question: And they, in these medical journals, they advertised, among other things, quote, "that no other cigarette will afford your patients, especially those who are sensitive to nicotine and tars in tobacco, such a degree of filter effectiveness," did they not?

And your answer was: Yes, that was based on the evidence --

MR. ROSS: Counsel, please read his whole answer. I'm sorry. Were you reading it?

MR. ROSENBLATT: Yes.

MR. ROSS: I'm sorry. I apologize.

Q. (Continuing) Your answer was: Yes, and that was based on the evidence that they had.

A. Without having seen the ad, I don't know how I could have testified to the precise wording. But the sense of it I believe is correct.

Q. Is correct. Okay.

What research are you aware of that Lorillard had done back then to back up that claim, which in effect said: This is the best filter on the market?

A. Yes. Lorillard had conducted measurements of filter efficiency on that cigarette in its own

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laboratory. The data were confirmed by another laboratory called Killian, and I believe also Arthur D. Little was the third laboratory that confirmed the efficiency of the Kent filter, and compared it with the competitive brands at the time and found the Kent filter to be the most efficient with respect to removal of tar and nicotine.

Additionally, they conducted some tests that were done on a group of volunteers who were smokers, and they found that the -- that there were changes in the temperature at the fingertips of some of these smokers when they smoked a cigarette; and of course, this is obviously constriction of the small blood vessels in the extremities for some individuals.

They found, using that bioassay system in humans, that of those people who experienced such a temperature drop in smoking cigarettes, of which they were about 30 percent of the population, that when they smoked the Kent cigarettes, they did not experience that pressure drop.

They followed that up with measurements of blood flow into the hand, a rate of blood flowing into the hand, and found the same kind of results: That smokers of some of the other cigarette brands experienced a reduction in blood flow; whereas, the

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smoker of the Kent cigarette did not experience the same result.

They also conducted tests measuring irritation, and the irritation test was done in the rabbit.

And then, lastly, they conducted some human studies where some physicians were examining the throats of smokers who smoked Kent cigarette versus the competitive brands, to see if they could determine a difference in the redness of the throat or the level of irritation.

Q. Don't you agree that the ad that I quoted from states, in effect, both to physicians and the consumers, that the Kent cigarette with the micronite filter is in fact a safe cigarette to smoke?

A. I don't believe that, no. I believe what it says is exactly what they said in the statement, and that's the supporting evidence that was available to them that they had collected to make those statements.

Q. The Kent micronite filter exists, doesn't it?

A. We dropped that trademark, I think, in about the early 1980s from the packaging of Kent cigarettes.

Q. I'm not so much interested in the trademark, what the filter was called. But I want to know when the filter, that was called the micronite filter,

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ceased to exist and there was a new kind of filter? Or are you telling me that the filter has remained the same?

A. No. The filter changed over time, but the trademark "micronite filter" continued to be used up until I think the early 1980s.

Q. Did Lorillard have problems with the Federal Trade Commission about misleading advertising with respect to the Kent micronite filter?

MR. HEIM: Objection.

MR. ROSS: Objection, Your Honor.

THE COURT: Sidebar.

(The following proceedings were had at sidebar:)

MR. HEIM: Your Honor, my objection is whatever generalized -- did it have problems with the Federal Trade Commission? It's irrelevant to this case whether they had problems with the Federal Trade Commission.

MR. MOSS: If he wants to prove something about advertising, he can do it, but the fact that somebody had or had not problems with the regulatory agency, did the government charge you with anything? You can't bring those kinds of things in. If somebody pled guilty, yeah. But that's exactly the area that

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we're into.

MR. ROSS: Furthermore, Your Honor, now we're completely beyond the scope of direct. Now we have nothing to do with the scientific evidence about low tar or anything else. Now we're talking about, did they have advertising problems, to which this witness has testified absolutely nothing about advertising in his direct testimony; didn't mention the word; didn't mention an advertisement; never talked about advertising policy; never talked about marketing in any way, shape or form.

MS. ROSENBLATT: This is all about research. This was misleading advertising because there was no research to back it up, no legitimate research for representations that were made, and that is what the question was all about. And he's testified to that in the deposition in the State of Florida case.

THE COURT: Wait a minute. I'm getting really fouled up here. I'm trying to remember his testimony this morning, but counsel is saying it's outside the scope.

MR. MOSS: It is.

THE COURT: I want to know how you think it's not.

MS. ROSENBLATT: Because he spoke about the

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research that's been done by Lorillard during the history, in the '50s and '60s, and here there were health representations made and they said there was research to back it up.

What Stanley is doing in cross is saying: Well, there wasn't really any research to back that up, and isn't it true that the FTC found that was very misleading and there was no research to back it up? And there are many proceedings that went on about that misleading advertising.

Otherwise, the jury has the impression that yeah, all of the legitimate research went on. Well, that's not true.

MR. MOSS: Well, the scope -- I agree with him 100 percent, it's outside the scope.

But even if you get past that, you can't -- they want to prove there was research done, they can do it. There's a way to do it. I think it's an area that's not going to be fruitful. But you can't do it by: Didn't you have problems with the FTC? We're back to -- you can't do it that way, Your Honor. Didn't the prosecutor charge you?

THE COURT: Well, I understand that aspect of it.

I wanted to crawl before I ran. And --

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MR. ROSS: Let's go back to --

MR. MOSS: That's why I said scope.

THE COURT: I agree. I'm still hung up on the scope issue.

MR. ROSS: The witness testified very generally that they did research on reducing tar and nicotine.

You allowed Stanley to ask the questions about the Kent micronite filter, over my objection, even though the witness never mentioned a word about the micronite filter. Fine.

Then they asked him: What was the research you had to back up the claim? The witness just answered it.

Now we have to let in, too: Did somebody make a charge that your advertising was bad? And now we're totally off in the field of advertising, and I'm not aware of what findings may have been made back in the 1950s or not, but that's not admissible anyway.

THE COURT: Okay. I don't know what advertising has to do with this area of questioning. I mean, I know generally speaking, overall, what it has to do with the case. But right now with relation to the testimony?

The testimony was that they did some

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extensive research into lowering tar and nicotine, whatever it was.

MS. ROSENBLATT: And biological --

THE COURT: And all that other stuff. And if it turns out that that particular type of testing and experimentation and all was flawed, faulty, bad result, that may be another story.

The only way that was determined was because of the advertising, apparently, because what they said in the advertising was something to the effect: It's the best of its kind filter-wise.

And then the FTC apparently took ahold of that, did something on the basis of that. You say there were a lot of hearings, a lot of discussions. I don't know what happened, frankly.

And the end result of that was --

MS. ROSENBLATT: They were found guilty. You know, we have it in a deposition; he's agreed to it.

THE COURT: Found guilty of what?

MS. ROSENBLATT: Misleading advertising. They had to withdraw and stop that entire campaign.

THE COURT: Okay. So the claims that they made to the general public were misleading?

MS. ROSENBLATT: Yes, the health claims.

THE COURT: Did that come out in direct

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examination?

MS. ROSENBLATT: Yeah, that there was no research to back it up. There was no research to back up the claims they made.

THE COURT: Wait. You're losing me.

When the deposition was read, was that information released? I don't remember it.

MR. ROSENBLATT: No. In the deposition we read to this jury, no.

THE COURT: That's what I'm saying. This is the first time this is coming up.

MR. ROSS: The first time.

THE COURT: And you're trying to get it in through this method.

MR. ROSS: And this witness didn't testify a word about advertising, what they advertised. It only opened the door because you let them ask the questions about it.

MS. ROSENBLATT: Very related to health claims.

THE COURT: If their research is faulty. He's still saying: We had great research and the research is appropriate.

They're entitled to show it wasn't. One of the ways they showed it wasn't is they were called down

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on it.

MR. MOSS: Now we're getting past the crawling --

(The sidebar conference was concluded, and the following proceedings were held in open court:)

THE COURT: Folks, why don't we take a short recess, please.

(The jurors exited the courtroom.)

(The following proceedings were had at sidebar:)

THE COURT: Okay. The basic testimony of today was that they did this research on filters. He went through the whole routine about the filters. They didn't mention the Kent micronite on direct. But he did talk about filter and filtration procedures for cigarettes, which opens the door to filter cross examination testimony.

So, on that you're asking him about the micronite filter, and the claim was made that it was a highly successful filter at that time, in the '50s, mid '50s, whatever.

MR. ROSENBLATT: Right.

THE COURT: And it turns out that a problem did arise because of some claims being made in the advertising that it was what?

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MS. ROSENBLATT: Here. This is the 58th Congress. The first part of it.

MR. ROSS: You see, Your Honor, that's not a finding. It's a report from Congress.

THE COURT: This is the deposition. The title of this is False and Misleading Advertising, from the 85th Congressional Record, Committee on Government Operations.

And the committee found, quote: "There can be little doubt the emergence of the filter cigarette is attributable to the widespread public belief that cigarette smoking is a health hazard."

MR. ROSS: That's not what she said.

MS. ROSENBLATT: This is all about the micronite. This is just a follow-up to it.

THE COURT: But today he said that he agreed with that statement. What was the statement that he made today?

MR. ROSS: That it was the most effective filter on the market. That's what the statement was.

THE COURT: Yes, something of that nature. And the FTC found otherwise?

MR. ROSS: No.

THE COURT: What did the FTC find?

MR. ROSS: None of us know what she's talking

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about, Your Honor.

MS. ROSENBLATT: I'm looking for it.

THE COURT: You don't know, your own people?

MR. ROSS: Well, you're talking about the '50s. Nobody here knows.

THE COURT: Sure you do. Of course you do. You researched it. You know exactly.

MR. ROSS: You give us far more credit than I deserve.

THE COURT: I only do that based upon the track record that I see; that at a snap of a finger documents appear out of nowhere. Information --

MR. ROSS: I tried snapping my fingers, nothing came up.

MS. ROSENBLATT: I need a couple of minutes to go through this whole section.

THE COURT: When you find it, let me know. I want to know what the FTC situation is.

MS. ROSENBLATT: Okay.

(A brief recess was taken.)

(The sidebar conference was concluded, and the following proceedings were held in open court:)

THE COURT: What did we find out?

MS. ROSENBLATT: I'm getting another deposition brought from the office.

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THE COURT: You're not ready?

MS. ROSENBLATT: I'll come back.

MR. ROSENBLATT: I'm going to another subject. We'll deal with this at our next break.

THE COURT: All right. Let's bring the jury and the witness in.

(Defendant's Exhibits KKK, LLL and MMM were marked for identification.)

THE BAILIFF: Bringing in the jury.

(The jurors entered the courtroom.)

THE COURT: All right. Have a seat, folks.

BY MR. ROSENBLATT:

Q. Dr. Spears, the testimony that you gave today in general terms, talking about the relationship between tar and nicotine with Mr. Ross, you gave testimony on that subject, the relationship between tar and nicotine, before a committee of the House of Representatives in 1993 or '94?

A. Yes, I did.

Q. And it was essentially the same explana -- pretty much the same as you've told the jury today, in terms of --

A. That they're highly correlated, yes.

Q. That they're highly correlated.

And that was testimony where -- part of that

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testimony used a chart from a Surgeon General's Report to help you explain that correlation, correct?

A. That's right. Sales-weighted average.

Q. And is it fair to say that after you got all done testifying, the chairman of the committee essentially accused you of lying to them?

MR. ROSS: Objection, Your Honor.

MR. NEWSOM: Objection.

MR. MOSS: Objection.

MR. ROSS: Could we go sidebar?

THE COURT: I guess we'll have to.

(The following proceedings were had at sidebar:)

THE COURT: You were right. It's going to get worse.

MR. MOSS: Look at that question, Your Honor.

THE COURT: I saw. I heard it.

MR. ROSS: We've been through this with Your Honor now numerous times. Your Honor has prevented this every time. They tried to read it in the deposition.

The question is: Didn't Chairman Waxman accuse you of lying?

Every time we've argued this, you've been consistent. You can't just ask him: Did somebody

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accuse you of lying? So somebody accuses you of lying. I could sit here and accuse Stanley's witnesses of lying. What difference would it make?

It's totally improper to stand up in front of a jury and say: Somebody has accused you of lying.

The rules are clear. If someone is convicted of a crime having to do with false testimony, you can bring that up. You can't ask a question: Has anybody ever accused you of lying?

MR. MOSS: It's worse than that. You can't do any of the things Mr. Ross just said. The rules are so clear.

Now, you go in front of a jury that's trying this case, and after you go through all of those, it is so much worse, the way that question was asked in front of this jury: Didn't the chairman of the congressional committee that you were testifying call you a liar?

Your Honor, Mr. Rosenblatt, once again, he says I'm going to personalize it.

MR. ROSENBLATT: Rosenblatt knows better, I'll write your speech for you.

MR. MOSS: I don't think he does. Because I can't believe that he would come in here and do that.

And Judge, there is -- I hate to do this, but you can't do this in front of this jury. Because of

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what he's done, we're flat into a mistrial situation. You can't sit there and allow someone to come in and tell this jury: The chairman of the congressional committee called you a liar, didn't he? And then say: Jury, disregard it; don't worry about it.

And Your Honor, whether he doesn't know any better or does know any better, if he didn't know any better, he ought to have researched it. And if he did, it's even worse.

MR. ROSENBLATT: I totally disagree with Mr. Moss. This is absolutely what cross examination is all about. They put on the number of -- the only CEO they've called thus far. On my cross examination -- he's admitted in two different depositions, in two different depositions: Yes, Waxman basically called me a liar. But he didn't understand.

That's his explanation. Not to address this issue -- this is -- because his -- his story, no, no one understands.

Then the tobacco reporter for the New York Times, arguably the number one reporter in the country on the subject of tobacco and health, writes a book called "Smoke Screen," and says the same thing.

MR. MOSS: So what?

MR. ROSENBLATT: In addition to saying that

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Waxman concluded that he was lying, the writer concludes, he says: I walked over to him. I walked over to him after the hearing and discussed it with him. And the writer said: I concluded he lied to Congress.

That's an untouchable?

MR. MOSS: Of course, it is.

MR. HEIM: Yes, Your Honor.

MR. ROSENBLATT: When he's testified on the same subject? We're not talking about someone just shooting off: I think you're a liar. The man heard the testimony. They heard from the CEOs. He's the chairman of --

THE COURT: Okay. What was the question that was asked on the subject matter at the congressional hearing for which there was --

MR. ROSENBLATT: Exactly -- the correlation between tar and nicotine. And he had a chart and he explained how nicotine, we don't spike with nicotine. It's highly correlated. Total denial of everything.

He had an article he had written years earlier. This guy's a liar.

MR. HEIM: Your Honor, that is a preposterous argument, preposterous argument, and Mr. Rosenblatt knows it's a preposterous argument for this reason: If

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you permit that kind of testimony, as trials evolve, that would have witnesses for one side, when they testified at some hearing, be confronted with somebody who is going to say: You're a liar, aren't you? It that comes into every trial, it would make trials a farce. You can't do that.

MR. NEWSOM: Your Honor, it couldn't be admitted, even if he had been indicted for it or put on trial for it, if he isn't convicted of it.

MR. MOSS: The point I was making earlier, the earlier one with the FTC, it's even worse here. Because, as I said, they could not have offered that even if there had been an indictment.

Five minutes before we had this very issue with the FTC. And now the next thing we have, he's blurting out to this jury: Didn't the chairman of the congressional committee call you a liar?

He comes in here and says that's perfectly fair game.

THE COURT: Do you have a case that backs up that, that you can do a thing like that?

MR. ROSENBLATT: Did they have any cases?

MR. ROSS: The rules make clear what you can put in evidence.

MR. HEIM: The rules.

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MR. ROSENBLATT: The usual seven against one here.

THE COURT: This is a very unusual procedure.

MR. ROSENBLATT: Yes, it's very -- I guarantee you, Judge, you're right. It's very unusual where a CEO of any company testifies before Congress, the head of the committee -- and this is what I asked. This is what I asked Spears: You were accused of lying -- on that subject -- on that subject. And his answer is: By Mr. Waxman, yes, that's correct.

THE COURT: But that's a deposition. A lot of things happen at depositions that don't happen at trial.

MR. ROSENBLATT: I understand that. I certainly understand that. But in terms of --

MR. NEWSOM: Your Honor --

THE COURT: The way to prove a person is not credible is to catch him in a lie and show a false statement by one that had been made previously.

Now, to have somebody say that you're a liar because I think you're a liar is the -- entirely different than saying: You made two different statements; which is true?

MR. ROSENBLATT: You noticed I never expressed my opinion.

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THE COURT: No, no. I'm not saying the lawyer. I'm saying another person, third party, has accused someone of lying, which is what you've done here. That's not the way it's usually done to show that a person is not credible. The way you do that is showing two inconsistent statements.

Now, I don't know what the inconsistent statement was which caused Waxman to believe that he was lying. Just --

MR. HEIM: Maybe there was none.

MR. ROSENBLATT: I'm going to give him an opportunity to explain that, because his answer --

THE COURT: Not that way.

MR. ROSENBLATT: -- his answer is that Waxman doesn't understand.

MR. MOSS: That's the problem.

THE COURT: Here is the problem. I don't think this should be done in the presence of the jury. I think it should be done outside the presence of the jury. I don't know how long you're going to take on this. We just had a recess with the jury. They're going to have to go back in the jury room again. But we can't help that.

I want to see what you're going to do with it and how you're going to handle that sort of situation.

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I have a mistrial motion. It wasn't made, but --

MR. MOSS: No. I did.

THE COURT: You didn't make a motion. You said it was mistriable.

MR. MOSS: Consider it a motion, please. This defendant moves for a mistrial.

THE COURT: Okay. Deferred.

MR. MOSS: I'll speak more clearly for you, Your Honor.

(The sidebar conference was concluded, and the following pr di s were held in open court:)

THE CO RT: Folks, I'm going to have to ask you to go back to the jury room for a few minutes, please.

(The jurors exited the courtroom.)

THE WITNESS: Am I excused again?

THE COURT: No. You have to stay.

Have a seat, folks.

VOIR DIRE EXAMINATION

BY MR. ROSENBLATT:

Q. Dr. Spears, I had asked you in the presence of the jury, now we're outside the presence of the jury, that your explanation about the relationship between tar and nicotine, and nicotine follows tar, that you basically gave that same explanation in front

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of the United States Congress, a committee chaired by Henry Waxman in the House of Representatives, and when you got all done, they listened to your answers --

MR. MOSS: Your Honor, can we do it a little lower? I still have the fear that --

MR. ROSENBLATT: I'll do it a little lower.

THE COURT: All right. Do you have an off/on switch on the mike?

THE BAILIFF: No, Judge.

MR. ROSENBLATT: I'll step back.

THE COURT: Just walk away from the mike.

BY MR. ROSENBLATT:

Q. When you got all done answering the questions, the chairman of the committee, Congressman Waxman, basically accused you of lying?

A. I wouldn't characterize it quite that way. There were two hearings. The first hearing I offered testimony along the lines that you've described, and it seemed to me there was something like a week, maybe, between that occurrence with that committee and the second occurrence.

And in between those two appearances, Mr. Waxman got on television or in the media and indicated that low-tar cigarettes were high-nicotine cigarettes, and that I had misled -- misled his

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committee, I believe were his words.

I then testified at the second appearance and found that his basis of that was an article that I had written in maybe 1981 or '82, dealing with trends in modern-day cigarettes, and I later found that his staff had mischaracterized what was written in that article and basically had confused nicotine in tobacco and nicotine in smoke.

And at the hearing I was testifying about nicotine in smoke and tar, which is also derived in the smoke. And the article I'm referring to had to do with nicotine in the tobacco, and the article said that the tobaccos found in the very low-tar cigarettes were somewhat higher in percent nicotine than those found in the other cigarettes.

And that was the basis of his confusion and his allegations. They were untrue, and I had said that there was no correlation between the nicotine found in the tobacco and the level of nicotine found in smoke of these brands. And that is absolutely true.

In trying to impeach me, he handed me an article from Neal Benowitz which he thought supported his point of view, and the summary in that article was exactly as I had testified. There was no correlation between the amount of nicotine or percent nicotine in

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the tobacco and the nicotine found in the smoke.

And of course, the obvious reason for that is the amounts found in smoke is mediated by the filter, air ventilation, the amount of tobacco in the cigarette, and other cigarette construction factors.

So that was the basis of the whole disagreement. I now believe that Mr. Waxman understands it. I have not been aware of any further accusations that I've misled anyone.

Q. Oh, sure. You're aware of a further accusation that you misled someone in the book written by Phillip Hilts, the tobacco writer for the New York Times. He also accused you of essentially lying to the congressional committee?

A. He made exactly the same analysis as Mr. Waxman, confusing the article that I had written with nicotine in tobacco with nicotine in smoke. Exactly the same erroneous argument Mr. Waxman had confused.

Q. Okay. Now, you seem today reluctant to deal with whether or not Mr. Waxman accused you of lying, but in your deposition in this case, April 15, 1997, Page 37, you gave these answers:

Question, beginning on Line 10: You will recall that when you testified in front of Congress --

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when was that, '94?

And you said it was either, '93 or '94.

Question: You were accused of lying on that subject?

Answer: By Mr. Waxman, yes. That's correct.

A. I think his words were misrepresented; misrepresenting the facts to the committee.

Q. Okay. But in your deposition you accepted that --

A. I don't think they're that much different.

Q. And in your -- in the Broin deposition, and the date of this is April 26, 1994, Page 20:

Question: Did you -- referring to Congressman Waxman -- did you feel he was accusing you of lying?

Answer: Yes.

A. Yes.

Q. And on Page 40 you say: I don't know why he thought I lied to him.

So, I mean, from your perspective, this was not some kind of scientific intellectual dispute. Your perception of what Waxman was saying, he heard you out and he thought you deliberately lied to them. I know your answer is he just didn't understand it. But he accused you of lying, correct?

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A. I said that low-tar cigarettes are also low in nicotine. And he said that's not true. He's absolutely wrong. I can't say enough.

Q. I understand that. I understand what you're saying. You're right --

THE COURT: I think I've heard enough on the subject.

MR. MOSS: Your Honor --

MR. ROSENBLATT: The witness should leave if we're going to have argument, I would think.

THE COURT: Well, I don't know if we're going to -- all right. Why don't you step out for one minute. It's not going to take that long.

(The witness exited the courtroom.)

THE COURT: Okay.

MR. MOSS: Your Honor, nothing that you have heard -- I mean, this proffer --

THE COURT: Yes. I really don't need a discussion on it. I agree with you all and your position. I think it's an improper question. I don't think it's appropriate to get into it.

If he wants to explain what he meant when he talked to Congress about the relationship between tar and nicotine and the fact that the people there misunderstood what he said, that's fine; he can explain

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it the way he explained it here.

But I don't think there should be any reference made by the question that people up there accused him of lying or accused him of misrepresenting any statement to Congress.

Anybody can accuse, and I just don't think it's appropriate under the circumstances.

So, if you want to get into what was said and what the misunderstanding was vis-a-vis the science, that's fine. I have no problem with that. But to say that they accused him of misrepresenting or accused him of lying, that's prohibited.

Now, do you still want a curative instruction at this stage?

MR. MOSS: I want more than a curative instruction, number one. As Your Honor knows, I think this is incurable, and we do move for a mistrial because --

THE COURT: I've already ruled on that. I deferred.

MR. MOSS: -- because I think that this little voir dire absolutely makes the point. And what Your Honor just said also underscores it.

Now we're put in a position, we're between the proverbial -- that is, the defendants -- rock and a

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hard place. We take the bait, because the jury now knows, according to Mr. Rosenblatt, that he was called a liar by the chairman of the congressional committee.

So now we are put in a position of either not responding to it, which is not a very attractive alternative, or explaining to the jury, even though Your Honor has now told him: You need to water down your words, in explaining what he meant and why someone else misunderstood, or in Mr. Rosenblatt's terms, called him a liar.

A plain and simple curative instruction to this jury simply won't do it. Now, if there's an instruction -- because, you see, it was an act that was intentional. This jury ought to know, not only are they to disregard it, but it was an entirely improper comment by counsel and should not -- I think you need to go at least that far, Your Honor.

I don't think it cures the problem, but I know you said you've reserved on the motion for mistrial.

But it was a comment by counsel. Counsel knows better, Your Honor. We had just been up there and talked about the FTC.

THE COURT: I know, but I don't admonish counsel in front of jurors; I admonish counsel in front

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of counsel.

MR. MOSS: I understand that. But therein lies our problem. That's why a curative instruction won't work.

THE COURT: I really don't think it's that insurmountable in that regard. I think if the jury understands there was a misunderstanding of the science of what was going on, that's something that the witness can talk about. That's fine.

MR. MOSS: Well, Your Honor, I think that at least Your Honor ought to tell the jury what you just -- that there was a mis -- a scientific misunderstanding.

MR. ROSENBLATT: I dispute that tremendously. Because if you look at the Hilts book, Judge, not only -- I think it's beyond -- it's beyond credibility to believe that Waxman, Hilts, and Congressman Kreidler -- everyone misunderstood. Everyone concluded that the man was deliberately lying.

I understand. But in Hilts' book, he talked about Congressman Kreidler, and Hilts concluded that he totally misrepresented.

THE COURT: You're telling me I've got to worry about a congressman worrying that somebody else is lying?

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MR. ROSENBLATT: I'm not telling you that. But to use Mr. Moss's constant refrain in a court of law, in a court of law where ostensibly we are seeking truth, we should not play the game that this was some kind of scientific dispute, when in point of fact, Waxman, Hilts, and other people concluded that he misrepresented a Surgeon General's chart, and that he --

THE COURT: I'll tell you how to do that. Bring one of them in here on rebuttal, okay?

MR. ROSENBLATT: Okay.

MS. ROSENBLATT: Your Honor, I want to read for th : rd Page 119 of the Broin deposition.

. uestion from Stanley: And my understanding of his accusation in a press conference following your March testimony was, I don't know if he actually said he thought you lied; I don't think he was that explicit. But my understanding of what he said was you misled Congress in your testimony.

Is that a fair characterization of what he said?

Answer: I don't remember all the words he used. But, yes, it was that I misled his committee.

Question: Did you feel --

MR. ROSS: Right --

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MS. ROSENBLATT: Question: Did you feel he was accusing you of lying?

Answer: Yes.

THE COURT: So what? There are lots of cases that say that's an improper thing to say in front of a jury, one witness saying another witness lied or someone calling someone else a liar, including lawyers. It's improper. It's not appropriate, okay?

So I don't care if an army of people came in and said he is a liar.

MS. ROSENBLATT: Well, the witness said it.

THE COURT: The witness said somebody accused him. So what?

MS. ROSENBLATT: Okay. But I don't think it's fair to then tell the jury that there was simply a scientific misunderstanding, because that really mischaracterizes it.

MR. MOSS: Judge, they're the ones that bring it up. They lay it on the jury's lap, and now they say: Judge, because of our misconduct --

THE COURT: Just a second.

If he lied in front of Congress, okay, under oath, in a congressional manner, there are remedies, which Congress did not take in this case, apparently. They didn't accuse him, they didn't charge him, they

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didn't excoriate him. They didn't do anything to him.

So the point being that he's an unindicted person, uncharged. All he is is named as a person who may have said something wrong in front of Congress.

Now, you can't bring that up in a court of law and say: Okay, we accuse you of something.

I don't think it's appropriate, not until he's either been charged or action taken upon it, which it wasn't.

Now, yes, when people lie, one could look at it and say it's a misunderstanding of fact, which it may very well be. It may be that somebody says something that another person misunderstands or misinterprets, until he finds out later that his interpretation was a little skewed; and maybe it was wrong. I don't know.

Right now all I'm faced with is the problem that the person went before Congress, he told them something, they didn't believe him at this point, and we have his facts -- he's explaining why there was this misunderstanding between he and whoever he was talking to. And he can sit here and explain why there was a misunderstanding of the science, which he said it was.

Now, if it is a misunderstanding of the science, so be it. But you can't bring it up in a

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court of law saying that he was accused of lying.

MR. HEIM: And in fact, Your Honor, you had it exactly right at sidebar, because the rule specifically says how to impeach and what is the proper way to impeach a witness.

And to kind of wrap -- it's ironic that one would wrap in the supposed search for truth with this kind of a deliberate misconduct, because it's not a search for truth.

THE COURT: The problem is this: Had it not been that the statement was made, we wouldn't have this problem. We could cure it. The problem was that the statement was made. We're trying to figure out some way to lessen the impact upon the jury because of the way the question was worded.

MR. ROSS: Well, Your Honor, I have a suggestion in that regard, because in addition to the curative instruction, we would request that the question should be disregarded.

Your Honor was suggesting: Well, if you want the witness to talk about the misunderstanding of science, we could do that.

Your Honor, he already has told the jury about the misunderstanding of science in the deposition, his video deposition that Mr. Rosenblatt

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played to the jury after Your Honor made the same ruling you just made, by the way, that he could not ask these questions; which is: Weren't you accused of lying and all those. You ruled all those out.

You let Mr. Rosenblatt -- and it was played to the jury, even though it was over our objection -- ask him about what was the staff report; what did it say about your testimony? Did it say your prior document or your -- what you had said before was different?

And, Your Honor, six pages of questions and answers about the scientific misunderstanding between Mr. Spears and the committee was read to the jury, after you eliminated all questions about were you accused of lying, did someone accuse of you of lying. You let him read those, and he said exactly what he just said on the stand, explained the tar and nicotine in smoke. The jury has heard all that.

So the way to cure this, because there's no prejudice because they've already got that misunderstanding in the record if they want to talk about it at some point in time, is instruct the jury that that was an improper question or to disregard that question and move on.

The problem is if we come back now and start

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talking about it, well, misunderstanding --

MR. ROSENBLATT: I'm not going to come back to it, Judge.

MR. KIRBY: I guess not. The damage is done.

MS. ROSENBLATT: Your Honor, let me just say one thing. What makes this different is this is not a situation where you go to a witness and you say to the witness: Weren't you accused of lying?

The witness has said under oath he perceived it that he was accused of lying. He used that terminology.

THE COURT: That's no different. No different.

MS. ROSENBLATT: I think it's a lot different, Your Honor.

THE COURT: No, it is not. It is not different, okay?

Convicted of being a liar, yes. Okay.

When he says on his own or a statement: I lied, that's different. But if somebody else accuses him of lying -- somebody can accuse you of stealing pennies off the newsstand. So what? Doesn't mean anything. Doesn't mean you're a thief, doesn't mean you've done it.

We can't make that jump, that leap. And we

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can't leave that out there in front of the jury thinking there's something onerous about it.

So the point being, the jury will be told to disregard the last question and answer, and we'll move on. Okay.

MR. ROSENBLATT: I'll go to another -- because from my standpoint, not being able to make that point, then you've clearly understood what you've said, I have no interest in him, you know, expounding on the science. It wouldn't make sense.

I may ask him questions about the correlation between tar and nicotine.

THE COURT: Fine.

MR. ROSENBLATT: But unrelated to his congressional testimony.

THE COURT: That's fine. Okay.

MR. HEIM: Your Honor, you will tell them that it was not a proper question or something along those lines?

MR. ROSENBLATT: They always want more. Your Honor, "disregard the question and the answer" says it all. They want me to be admonished in front of the jury.

MR. HEIM: That doesn't say it all.

THE COURT: I think that if I tell the jury

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to disregard the question and answer, they get the understanding that it was not appropriate. Because if it was appropriate, I wouldn't say disregard the question and the answer.

MR. MOSS: Well, there was no answer. There was no answer.

THE COURT: Well, the question, okay. The question.

MR. MOSS: The problem is, I didn't realize, until Mr. Ross --

THE COURT: I didn't either.

MR. MOSS: -- that we had been over this, when they offered the deposition. That's why I asked him to get the transcript.

THE COURT: Okay.

MR. MOSS: This makes it so much more egregious, Your Honor.

THE COURT: I can take action of egregiousness of counsel's behavior, but not right now. I don't want to do it now while I've got a jury out there and things to do. We have a record and the record is sufficient. If I need to take action, I can always refer back to the record and do it, if I felt that it was appropriate.

Right now I just want to get on with the

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testimony and the trial. So what I'll do is I'll bring the jury in and we'll move on.

THE BAILIFF: You want the witness?

THE COURT: And the witness, yes. I guess we'll need him.

(The witness entered the courtroom.)

THE BAILIFF: Bringing in the jury.

(The jurors entered the courtroom.)

THE COURT: All right. Have a seat, folks.

All right. The jury will disregard and pay no attention or consequence to the last question that was asked.

Let's proceed.

CONTINUED DIRECT EXAMINATION

BY MR. ROSENBLATT:

Q. Dr. Spears is a -- if you compare -- for example, how many different kinds of Newports are there, from the lowest tar to the highest tar?

A. I'm not sure I can recite them all, but there is a Newport Lights, which I think is an 80-millimeter product in a box packing. There is a Newport Lights, a 100-millimeter product in a box packing.

There is also, with regard to full-flavor products in the box, 80-millimeter box and 100-millimeter box package. And there are soft -- what

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is called soft packs, as well, in the 100- and 85-millimeter lengths, particularly in the full-flavored products.

I'm not sure I can rate all those precisely in terms of tar level.

Q. I ask you this question as the chairman of the board of Lorillard.

Is your lowest-tar Newport -- from the standpoint of your customer, your smoker, is the lowest-tar Newport less hazardous to his or her health than the highest-tar Newport?

A. Well, I think that requires some explanation before I answer yes or no.

If you assume that tar is a hazardous component, and if you assume that people smoke cigarettes in a way that they would get less tar from that which yielded less in a mechanical smoking machine, which are the comparisons we're talking about, then it would be logical to conclude that if there was a hazard, the one with the lower tar would be less hazardous.

But I have no way of proving that, and there are a lot of assumptions, and I would regard the cigarettes as equivalent in terms of hazard with respect to smoking.

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Q. So, your answer is, as the chairman of Lorillard, from the standpoint of health consequences you cannot say to any smoker that by smoking my lowest-tar product it's less hazardous to your health than our highest-tar product?

A. No, because, number one, I don't know how the individual is going to smoke the cigarette. I don't know how many cigarettes they're going to smoke, and it's possible to get more tar from a low-tar cigarette if you smoke three or four of those than one of the other type.

So, for all those reasons, I cannot make a statement about safety with respect to an individual and the brand that they're smoking.

Q. And that's the process of compensation you just described, right, when you say "how a person smokes a low-tar cigarette"?

A. Could be. Loss of flavor and the way they smoke it, you could call it compensation.

Q. Okay. Now, just a moment ago in an answer you said: If you assume that tar is the hazardous component.

My question to you is: Do you assume that tar is the hazardous component of cigarettes?

A. I do with respect to mouse skin. I don't

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with respect to inhalation studies; in that we have not been able to produce a response, at least a tumorigenic response, through inhalation in animals.

So the best answer I can give you is that I don't know if it's the hazardous component. There is some information that says it may be; there's other information that says it doesn't appear to be so.

But, in any event, whether it's hazardous or not, if you reduce it, then you have probably made an improvement, although you can't prove that you have.

Q. Dr. Spears --

A. Yes.

Q. As the chairman of Lorillard, the former CEO of Lorillard, a 40-year employee of Lorillard, a man that has a Ph.D. in chemistry, how can you have made that statement, knowing what is contained in the 1964 Surgeon General's Report and every subsequent Surgeon General's Report, which asserts without equivocation that cigarette smoking causes not only lung cancer, but many other diseases?

How can you say, in 1999: We just don't know?

MR. ROSS: Objection. Argumentative.

THE COURT: Overruled.

A. I think, first of all, the 1964 report says

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that -- it concluded that smoking caused lung cancer among men. They didn't know, as far as the report was concerned, with respect to women. And later on that was modified to include women. And at the time I don't believe they said anything with respect to cardiovascular disease or some of the other diseases.

So this has been an evolving kind of thing. It isn't from 1964 this was the situation. The situation has changed over time, and my position has changed over time. And that is, that I believe that cigarette smoking is a risk factor for these diseases.

It's been consistently shown to be so over time. It was not consistently shown to be so in 1964, and that's the reason for the statements that were made in that report as being equivocal in your statement, or in your sentence.

So my statements I think are consistent with the scientific facts.

Q. Well, you're absolutely correct to make the point that the 1964 Surgeon General's Report only found causation definitively with respect to lung cancer in men. But you know that within a few years they found, the Surgeon General of the United States found, that it was a cause of lung cancer in women; and then in subsequent years, cardiovascular disease, chronic

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obstructive pulmonary disease, emphysema, many other forms of cancer, where the Surgeon General said it causes those kinds of diseases. Correct?

A. Over time the Surgeon General has moved to those positions. As I said, it has been changing. Information has been gathered and interpretation of that information has changed over time.

Q. But the position of the tobacco companies, with one exception, Liggett in recent years, the position of Lorillard, Brown & Williamson, Philip Morris and Reynolds has never changed to this day, in that the industry-wide position is the position that you have just expressed, which, put succinctly, is: It has not been scientifically proven -- yes, it's a risk factor, but it has not been scientifically proven that cigarette smoking causes these diseases.

That's your position, correct?

A. First of all, I don't speak for the industry; I speak for Lorillard. And the Lorillard's position and my position is as I have said it and I think you have articulated it. And it is based upon the fact that we do have -- we have established, the scientific community has established that smoking is a risk factor for those diseases, which means that there is a statistical association between smoking and the

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occurrence of these diseases.

It does not mean that everyone who is a smoker is going to get these diseases. Example in terms of lung cancer, 90 percent do not, even though they smoke all of their lives. So, clearly, it's not a risk factor for those individuals that don't get disease, and it's not a cause because they didn't get disease.

We don't understand the explanation. There is no explanation of why this is the case.

We do not get tumors in animals when we do inhalation studies, even though we can show that the amount of material deposited in the animals is equal to or exceeds that deposit in the human, when they smoke cigarettes in large quantities.

We know that these animals are susceptible to getting lung cancer because other agents cause it. For example, diesel exhaust causes lung tumors in animals, but not cigarettes. So there is a missing piece. Why is that so if this is causative?

I don't think you can say that it is causative, because of this kind of gap and gaps that relate to we just don't know what is going on. We don't know how cigarette smoke would interact with genes or whatever it might be. There is no

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explanation.

And although I think the Public Health Service and public health officials take the position this is causative, they want to communicate to the public that cigarette smoking is something they ought to cut down or not do, and that is their policy, and they're going to continue with it, it is not supported by the absolute facts. And I think many scientists would agree with me, this is not causative in the sense -- scientific sense.

Q. Name me one -- name me one medical doctor from a prestigious university who has written in peer-reviewed journals who is willing to walk in and look this jury in the face, a medical doctor who treats people, who is going to say what you just said, that causation has not been scientifically proven.

A. Well, first of all, I don't think you would find very many medical doctors who are conversant with all of the research data that is in on this subject.

But, nonetheless, I think you've asked me this question before, and I think there are basically two groups of people, maybe three: One, those that are in the tobacco industry or have done work associated with the tobacco industry, some of whom will take that position, certainly; and there are the public health

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servants, the public health officials, who are committed to the idea that the public should not smoke and are saying so.

They say there is no safe cigarette; you should not smoke any cigarettes. That is their position. It's causative, and, you know, quite frankly, this is a conservative position they're taking, and probably the right position for a public health official to take. But that is not saying that the data is here to call this causative.

Q. You say I asked you the question before?

A. I think so.

Q. In a deposition several years ago?

A. I believe so.

Q. And in all those years, you still haven't been able to come up with the name of one M.D. who is willing to walk into this courtroom, connected with a prestigious university, who is conversant with this subject, who will say what you say?

A. I haven't looked for those individuals.

Q. You haven't looked?

A. But I think you should realize that the Public Health Service and many of the really advocate kind of people are out telling the journals they shouldn't publish anything that's produced by someone

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who is funded by the tobacco industry; they are threatening that if anybody in their department, medical department, medical schools, take money from the tobacco industry, they should not take money from the tobacco industry.

Q. You have evidence of that?

A. Oh, yes. It's been published in some of the leading journals; that they've been asked not to accept scientific articles if the article is produced by an author who is funded by the tobacco industry, or somebody in the tobacco industry.

Q. Now, Dr. Spears, you said: I don't speak for the industry; I just speak for Lorillard.

Now, I want you to assume that every CEO, whether it's Philip Morris or Brown & Williamson or RJ Reynolds, has said -- not in the exact words, but precisely what you say: It hasn't been scientifically proven, there are still gaps, need more animal research, got to do more research.

Do you think that's just a coincidence, or is that the party line of the tobacco industry in this country, as Mr. LeBow has testified to in this case?

MR. MOSS: Objection, Your Honor.

MR. HEIM: Objection.

THE COURT: All right. It's sort of a

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compound question. I'll sustain it regarding the last part of it. See if you can rephrase it.

BY MR. ROSENBLATT:

Q. Forgetting about Mr. LeBow, my question to you is:

Do you think it's a coincidence that every tobacco executive on the issue of causation, does my product cause my customers to get lung cancer and heart disease and other diseases, they all say, it hasn't scientifically been proven.

Do you think that unanimity of opinion is a coincidence, or do you think it's the party line of the tobacco industry?

A. I think it is the state of the science. I don't know what their opinions are, other than what's been reported from now and then in the literature -- or in the press. But that is a correct scientific position. If that's one they're taking, it's consistent with mine, and I would have no fault with it.

Q. Have you read any of the testimony in this case from Former Surgeon General Richmond?

A. No.

Q. From Dr. Petty, from Dr. Ronald Davis?

A. No, I haven't.

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Q. Who do you figure knows more about disease, medical doctors who have treated thousands upon thousands of patients who have had lung cancer and heart disease, or the guys that run the tobacco companies?

MR. MOSS: Objection, Your Honor. It's an improper question.

THE COURT: No. He can express his opinion on it, if he wants to.

A. I think the most knowledgeable people are the scientists, and generally they are not the M.D.s unless they also have a Ph.D., but people who are conducting scientific investigations. They are not people who are practicing medicine. Practicing medicine is treating disease; it is not doing research in terms of causative factors in disease.

Q. You're telling this jury that in your opinion the most knowledgeable people on the issue of whether or not cigarette smoking causes cancer and other diseases are those people who never in their life have treated a human being or diagnosed a condition -- that those people know more than the M.D.s who have treated lung cancer and heart disease and taken detailed histories and made diagnoses? That's your testimony in this case?

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A. No. You're characterizing it. I don't think that was my testimony.

My testimony is those people, whether M.D.s or Ph.D.s or combinations of the two, that were doing research, are more knowledgeable than those who are clinicians who do no research but simply treat disease.

They are those who publish the scientific articles that we're referring to.

Q. Look, Dr. Spears, 45 years ago the tobacco industry, including Lorillard, told the American people: Boy, we see some of these studies about does cigarette smoking cause lung cancer. We don't think it does, but we're going to look into it. We're going to set up TIRC.

And 45 years later you're telling the American people, when asked the bottom-line question: What have you found out? With all the research, all the millions of dollars, we're back to square one: I don't know. Hasn't been scientifically proven. Just keep smoking our cigarettes.

A. Not at all. That's not a proper characterization of what's happened over that period of time.

Q. Didn't you just say --

MR. MOSS: Let him finish his answer, Your

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Honor.

THE COURT: I was under the impression he was finished with the answer.

If you're not finished with the answer, you may so state. But if you were, we can move on with another question.

BY MR. ROSENBLATT:

Q. Were you finished?

A. I, quite frankly, lost my train of thought.

THE COURT: All right. Ask your question.

BY MR. ROSENBLATT:

Q. 45 years later you still -- the answer to the question, that the only relevant question to a smoker is: Is this addiction going to kill me or make me sick?

Your answer is like it was 45 years ago: Don't know.

MR. KIRBY: Objection, Your Honor.

MR. ROSS: Objection to the --

Q. Isn't that true?

A. No, it's not true.

THE COURT: Overruled.

Q. It's a risk factor, but I don't know if it's going to hurt you?

A. The answer to the question is, 40-some years

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ago we did not know whether smoking was a risk factor for these diseases or not.

I think at that time there was one epidemiological study. It was a case control study using confounders, which is frequently confused -- the conclusions of the study, because there are confounders involved. That was the state pretty much.

I don't know whether you're prior to the skin painting experiment of Wynder in your timing here or not. But maybe that was the additional piece of information.

Nobody knew then and nobody knows now whether skin painting is something that relates to the human being or it's just a model that doesn't relate, for the reasons that I've given earlier.

So the state of science has moved dramatically forward in terms of information. We now know that smoking is a risk factor for these diseases. There have been consistent associations, although they vary in strength, that have been obtained over time.

There have been prospective studies, as opposed to case control studies, prospective being a better study with respect to controlling confounders. All that has transpired. We have looked extensively to composition of tobacco smoke.

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At that time, probably there was maybe 100 or so components of tobacco smoke known. We're talking about four or five thousand known today.

We have looked for additional animal models, studied intensively inhalation models, have not been able to produce tumors in these animals.

Sorry, but I can't conclude that we did. Nonetheless, that's information as to why the position is what it is today.

So there's been a lot of information that's been produced in this time. And today, for example, there's also a tremendous amount of information being developed on what's happening within the cells, at the molecular level, cellular level, gene level, in the genes and genetic material. There's been tremendous advances over time; and my answer has been that it is a risk factor. But for these other reasons, I can't conclude that it's causative. If that upsets you, I'm sorry.

Q. Doesn't upset me, because thankfully I don't smoke.

THE COURT: All right. All right.

MR. ROSENBLATT: Well, he personalized it.

MR. MOSS: Your Honor --

THE COURT: Just ask him a question.

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MR. ROSENBLATT: Let me get very specific.
BY MR. ROSENBLATT:
Q. This gentleman is Frank Amodeo, smoked a long time and developed lung cancer -- developed throat cancer.
MR. MOSS: Objection --
MR. ROSS: Objection,
MR. MOSS: Your Honor, let's go sidebar. Your Honor, let's go sidebar.
THE COURT: Folks, why don't you go outside.
(The jury exited the courtroom.)
THE COURT: Wait a minute.
(The following proceedings were had at sidebar:)
What I want you to do is go out that door there, and what I want you to do is wait until he gets out of here. Then you can go out that door over here and just cool off. Okay?
(The sidebar conference was concluded, and the following proceedings were held in open court:)
(A brief recess was taken.)
(The witness exited the courtroom.)
MR. HEIM: We, again, move the Court for a mistrial, and the reason for it is, within the last two hours we have had three instances in a row of what we

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urge Your Honor to find are misrepresentations that were made knowing that they were misrepresentations.

First you had the FTC issue where there was a representation made that there was a finding that Lorillard had engaged in fraudulent advertising, and to anybody's knowledge in this courtroom there's been no such finding.

We get past that, and then we have this incident with the congressional matter where not only is it wrong to do it under the rules, but in addition to that, that had already been ruled upon before. It had been ruled upon not only in Broin, but in this very case in connection with the deposition that had been tendered earlier in plaintiffs' case.

So counsel had to know that you can't do that under the rules, that you shouldn't do that because of Your Honor's ruling, and went ahead anyway.

We get past that one, and we wind up with a deliberate defiance of this Court's direct order that there be no representation, no statement made in this court about any particular plaintiff having any particular disease or affliction.

That was a ruling that Your Honor made before opening statements. And everybody had abided with it up until this time. And yet a third time within two

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hours with the same witness. It's strike three, Your Honor.

And the only reason that it happens is because counsel keeps getting away with it, keeps getting away with doing it. And the jury hears it each time.

Three times now this has happened today. Twice the jury has heard it, and we think three times is three times too many. And we ask Your Honor to declare a mistrial because they brought it on themselves. They did it deliberately and they brought it on themselves.

MR. ROSENBLATT: My response, Judge, to this is, there is a level of anger and frustration at these -- we've always got seven or eight at this table.

What they did today they have done for months. There must have been four sidebars yesterday. I keep getting away with stuff. I keep getting away with stuff. The nerve.

There must have been four sidebars yesterday on the issue of the JAMA article, and every time Your Honor made a ruling, they would whittle it down, whittle it down, and I was allowed to do certain things; and obviously, I abided by your rulings, and as always with the defense, it's like yesterday never

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happened.

They walk in this morning and Mr. Moss -- the designated excluder -- comes in and says: You know, I think you made a mistake yesterday. And we're revisiting the issue all over again.

But okay, to get very direct with Spears, if they had been straight with me when I asked them: If you're going to call Dr. Spears and I'm going to have the opportunity to cross examine him, I don't need to waste time reading excerpts from, you know, his deposition -- they had the right not to tell me. They chose not to tell me. I did what I had to do.

But Your Honor's ruling, you will recall that as we would go through depositions, you would say on a fairly rapid basis, because there was so much material in front of you: This is in, this is out.

We didn't have any lengthy discussions on this issue where you held that if he were here, sitting here, that I could not cross examine him. Obviously, Your Honor disagreed with me, and I did something that you felt I shouldn't have done. But to accuse me of being deliberate.

Now -- and these witnesses get away with so much. They just go on and on and on. Repeat and repeat and repeat. They're not responsive. I don't

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always want to be in the position of saying it's not responsive. Your Honor has been very liberal in allowing all witnesses to explain their answers.

At the very beginning of the trial during opening statement I introduced Frank Amodeo and all the class reps, and told the jury what his condition was.

My question to Spears, since I can never -- you can never get a direct answer, my question to him was going to be: Well, here is Frank Amodeo sitting here, smoked a lot of cigarettes in his day, got throat cancer. Your answer to him would be: We don't know if the cigarettes caused your throat cancer? And that was going to be it.

I think that's perfectly legitimate. Because that finally -- they're always in the abstract and the obtuse and the risk factor, and I thought that was a perfectly legitimate question.

And they deliberately overreact, and they always with -- this is their third -- they're constantly moving for mistrials, constantly revisiting things. I don't think there was anything wrong with that question, and obviously Your Honor -- you know, but not everything has to be elevated.

And Mr. Heim has not been doing it, but now he's accusing -- and that's the reason I got so angry

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at Mr. Moss, because Mr. Moss never at sidebar makes an objection where he's not either insulting my wife or myself. All his -- instead he just -- the objection, wrong question, whatever your legal grounds are, fine, we can live with that. It's always, "Rosenblatt knew better," or "You see what's being done here."

You know, it's a psychology and it's a tactic to wear it down and make Your Honor suspicious of your motivations, to make you suspicious. And it just gets to a person. I apologize to the Court, and I walked over to Mr. Moss before and I said that I apologize to you, and I basically apologized to him. And that was basically it.

You know, objection, you know. Not every -- not everything has to be elevated to this, you know, level. And they're doing it, not me.

MR. MOSS: Well, fortunately, Your Honor has been here, because Mr. Rosenblatt, with all due respect, is talking about a situation that I have not been a witness to. That's not what happened here.

And Your Honor, there is no stretch of anyone -- yes, I get up there and say Mr. Rosenblatt knows better, and I said Mr. Rosenblatt earlier, whether he did it intentionally or not, he should know better, and he does know better.

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Now, I know he did it intentionally, because we've talked about it.

Judge, it began with the FTC, and I gave you the analogy that if someone had indicted this witness, they couldn't talk about it. And it's so clear.

And we go from there, and Mr. Rosenblatt says: Judge, this is just the heat of the battle, don't pay attention to this, it's stuff that goes on every day. I submit to Your Honor it doesn't go on, in any court, every day.

And Your Honor, we are all bound by the same rules of professional conduct, and we're all bound to know what the rules are. We're all bound to abide by them. We're bound to abide by the Court's rulings.

We now get to the next thing, which is: Congressman Waxman called you a liar, right? And of course, we leave that.

Then we get to the last one where Your Honor clearly, before we started this trial, said: There will be no mention to this jury of the individuals in this case.

Mr. Rosenblatt got a concession and said: Judge, I think I need to tell the jury on opening statement -- I've got to introduce my people. He said: I want to tell them what they suffer from.

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Your Honor said: All right, you can do that. But nothing else.

That's where it was. And we all know the rules that you set down on that.

Now, once again, he blurts it out. He knows what he's doing. And yes, I did get mad, and I am mad, because I can't understand why this trial is being conducted this way.

He can't pass it off as the heat of the battle, Your Honor. I mean, we have now got a jury that has heard so much they shouldn't have heard. Your Honor has instructed them to disregard it. We're at a point, Your Honor, where we can't get a fair trial here because of his cheap shots.

MR. ROSS: Your Honor, without being personal about anybody or anything, let me make one thing clear for the record.

In this case, no one ever asked Lorillard -- I'm counsel for Lorillard; Mr. Newsom is counsel for Lorillard. No one ever asked either one of us to commit whether we were bringing Dr. Spears to testify.

Dr. Spears has been on our witness list since day one as the only Lorillard representative.

THE COURT: Okay. I've said before, and I'll say it again, this is not your run-of-the-mill, usual

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case. And because of it, situations that arise have a different flavor, have a different meaning, have a different consequence.

We've been at this thing since July. Hopefully, there's light at the end of the tunnel for another six weeks. I've been trying very hard to get to that point, and I really don't want to throw it away at this point.

And I've deferred ruling on mistrial.

You all know what that means. You all know the consequences of that. I desperately want to see this case tried on the merits of this case. I don't want it to be tried on individual personalities.

And we were told at the very beginning of this case that there was some sort of a conflict of personalities between Mr. Moss and Mr. Rosenblatt. I think it was generally known within the community. And we've been very good about it so far.

I thought I laid the law down to you at the very beginning, told you I wasn't going to provoke any action between the two of you, and you've been very good. There was little quips here and there, but today was a little bit more than it should have been. I trust that it won't happen anymore.

I will defer on the motion for mistrial,

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since the motion was made. I'm reserving any ruling on any action against Mr. Rosenblatt at this time. I think I told you before that I have and here reserve. In the event that I need to, I can always do what I have to do.

I want the trial to continue on without any incriminations, without anybody getting their feathers ruffled or anything else. I just want to put on witnesses and hear testimony and get moving. That's what I want.

I haven't made up my mind as to whether Mr. Rosenblatt did anything that he did intentionally. I'm not saying he hasn't; I'm not saying he has. I'm keeping it in mind.

What I really want is to move the trial appropriately forward.

Now, it's true, at the beginning of the case, we did say that we were not going to utilize any of the class reps as part of evidence testimony or in any way make any reference to them. I understand what Mr. Rosenblatt was trying to say: What do you say to a smoker?

He could have said "a smoker," but he said "Mr. Amodeo." And I think that was a lapse on his part.

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While he thinks it wasn't appropriate, it does run afoul of the Court's ruling initially. It isn't that huge of a breach, but it is somewhat of a breach.

I don't know the FTC situation, I really don't. I don't know what the decision was, if there was a decision. I was waiting for something to come from the plaintiff as to what that was all about. And I'm still waiting to hear something on that.

The Waxman thing is a different story. I think we've gone through that. We went through it initially when the issue came up on the deposition. I thought my ruling was rather sufficient on that issue. I was surprised when it was raised again. We did discuss it, and unfortunately, it was raised.

We can't undo what has been done as far as the jury is concerned about that. I think we tried, but we're in that position.

I don't think this latest situation in any way will affect the outcome of this case via the jury in any regard. This is something that we know about. It's more internal than anything else, and I really don't think the jury cares much about it.

So what I would like to do, after this little hiatus, is to bring the jury back in, bring the witness

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back in, and continue on with the testimony and evidence and move on with this case.

I don't really want to excoriate anybody. Okay? But the behavior of the two lawyers was not appropriate. You can get angry, and I understand feathers get ruffled. I understand you get anxious and all that. But finger pointing and accusations, I won't tolerate.

And for the two of you, you're very lucky that I did not hear what you said to each other, and fortunately, the court reporter didn't take it down. Because I didn't want to hear it.

But I don't want it to happen again, folks. I really don't.

MR. ROSENBLATT: Yes.

THE COURT: Mr. Rosenblatt has, in court, apologized to the Court. I will accept his apology. I know he walked over and talked to Mr. Moss. I don't know what he said, but I think it was an apology to Mr. Moss. I don't know what Mr. Moss said back to him. I hope it was also an apology, and I would like to get on with the case. All right?

Okay. Let's get the jury out here and get to work.

MR. ROSS: Your Honor, I would request that

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you instruct the jury to disregard the last question.

THE COURT: I don't know whether it pays to do that. I think we just ought to move on.

(The witness entered the courtroom.)

THE COURT: And don't take it as a sign of weakness either, okay?

THE BAILIFF: Bringing in the jury.

(The jurors entered the courtroom.)

THE COURT: Okay. Have a seat, folks. Okay. Everybody relaxed?

THE JURORS: Yes, sir.

THE COURT: You have more fun in there than most people. I don't know how you do it, but you do.

All right. We're back to square one. Let's continue with the questioning.

BY MR. ROSENBLATT:

Q. My next mellow question is going to be:

Dr. Spears, what do you say to a Newport smoker, 30 years smoked your product, has lung cancer, his treating doctor and every doctor he's ever seen has said: The reason you got lung cancer is because you smoked for 30 years, pack and a half a day; meets you and says: Did your product do this to me?

What is your answer? What is your answer to this customer, this 30-year customer who has lung

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cancer, and who is convinced and his doctors are convinced that your Newports caused his lung cancer? What is your answer?

A. Well, first of all, I would not give the individual medical advice. I think that's up to the physician.

In terms of what caused the cancer, I think that unless this physician knows something that I don't know, it would be impossible to make that determination as to what the cause is.

Q. That would be your answer to him?

A. That's my answer to you.

Q. Well, what is your answer to him, your customer for 30 years?

A. My answer would be I don't know what caused his lung cancer.

Q. And you certainly don't know if his lung cancer was caused by your product?

A. I said I wouldn't know what caused the lung cancer, cigarettes or anything else.

Q. And if a discovery is made tomorrow, where somehow they come up with a mechanism that satisfies you that, hey, the Surgeon General has been right since 1964, the Royal College of Physicians has been right since 1962, cigarette smoking causes all these

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diseases, how would you feel about that?

A. If data was there that would allow me to reach that conclusion, then I would certainly conclude that.

Q. And you'd -- you're sorry?

A. That I'm sorry?

Q. You're sorry to all these people that developed diseases from smoking your product?

MR. ROSS: Objection.

THE COURT: Sustain the objection.

BY MR. ROSENBLATT:

Q. Okay. You used to be a smoker?

A. Correct.

Q. Quit 22 years ago, because -- following a heart attack, right?

A. 1977.

Q. Haven't smoked since?

A. Occasionally.

Q. Okay. You quit because you had a heart attack?

A. And because I was left with an electrical malfunction of the heart; and nicotine and caffeine, for example, are not supposed to be ingested as a result of the condition that I have.

Q. Have you ever -- has Lorillard ever listed

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for your customers the ingredients in tobacco smoke which have been designated as carcinogens by the medical and scientific communities?

MR. HEIM: Objection, Your Honor --

MR. ROSS: Objection. Preemption.

MR. ROSENBLATT: Well --

THE COURT: Okay. I think we'll have to talk about this.

(The following proceedings were had at sidebar:)

THE COURT: Let me first find out what the objection is.

MR. HEIM: Your Honor, I objected on preemption grounds, because it doesn't discriminate in terms of time period. So at least subsequent to July 1, 1969, it would be --

THE COURT: Well, I haven't -- there's always the other problem, what means of communication we're talking about.

MR. HEIM: Which is vague.

THE COURT: Which is at this point vague. Now, it was my understanding that some of these were, if not all of -- what did you call it, the additives or ingredients?

MR. HEIM: Ingredients.

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THE COURT: You're talking about the four or five thousand ingredients in smoke?

MR. ROSENBLATT: Yeah. He had said that --

THE COURT: Not the additives, because there is another list.

MR. ROSENBLATT: Right. He said there was 40-some-odd carcinogens. All I am asking him now is: Did you ever list them for the public, at any time?

THE COURT: At any time.

MR. HEIM: Well, the problem with the question is, it implies that they should have listed them for the public, which suggests that the warnings aren't adequate.

MR. MOSS: Exactly right.

THE COURT: Yes. That doesn't present a problem if you're talking about prior to 1969; that's one thing. Afterwards is also another thing.

MR. ROSENBLATT: Yeah, for my purposes, I don't really want to divide it up.

THE COURT: You do or don't?

MR. ROSENBLATT: I don't. If you say I have to, I'll drop it.

THE COURT: I think you're going to have to. I mean, you know, if you interpret the preemption rule --

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MR. ROSENBLATT: I mean, to me, this is not really a cause question; it's an isolated question having to do with ingredients which are carcinogenic. And he's already testified that he doesn't think it causes anything in humans.

THE COURT: I know, but we have --

MR. HEIM: Not the issue.

THE COURT: -- the preemption restriction which we have to deal with, and that goes to health, and that's the problem.

So if you say: Did you tell the public there are 40 carcinogens in smoke, that's -- however, prior to '69, when there wasn't any restriction, that's a different story.

MR. ROSENBLATT: I don't want to do that.

THE COURT: Fine. Sustained.

(The sidebar conference was concluded, and the following proceedings were held in open court:)

BY MR. ROSENBLATT:

Q. Now, at the time the Tobacco Working Group was formed -- I believe you said in '68?

A. Correct.

Q. Okay. Back then, in '68, did you recognize that there was a health hazard attendant to the use of cigarettes?

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A. We recognized that cigarettes were a risk factor, in some of the epidemiological studies that had been published prior to that point, yes, certainly recognized that; recognized the animal skin work, various bioassay systems that had been developed and results that had been obtained with cigarette smoke condensate.

Q. Well, I want to ask you a question from earlier testimony you gave, not in this case.

MR. ROSS: Sorry. I don't have a copy of that. He will have to show the witness.

THE COURT: You can stand there and look over his shoulder, or you can all look over the shoulder with the witness, if you like.

MR. HEIM: Have a huddle.

BY MR. ROSENBLATT:

Q. This question was asked and you gave this answer:

Did you recognize that there was a health hazard attendant to the use of cigarettes back in this time frame, 1969?

Answer: No, I did not.

Clear as day: No, I did not.

A. Is that fair?

Q. Well, your answer is different today, isn't

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it?

A. I said I recognized the information that's available at that time, but I did not recognize that cigarettes were a health hazard. That's something different.

Q. Okay. Okay.

How could you work with a group, the Tobacco Working Group, whose whole purpose was to develop a safer cigarette, if in your mind there was no indication that cigarette smoking was harmful?

A. Oh, I think scientists can work to develop a safer product with respect to the bioassay systems, which is what the Tobacco Working Group was doing, without accepting the idea that these bioassay systems can be translated to the human being, without knowing that they can or can't.

Q. Isn't it a fact, Dr. Spears, that the nine years that you and the other tobacco companies were working with the Tobacco Working Group, from the standpoint of the tobacco companies, it was all public relations; you knew that you didn't believe in the concept of a safer cigarette; you could never call something a safer cigarette, because that would be admitting that your products were unsafe?

A. No. That's a total mischaracterization, that

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it was a public relations effort. It was an effort by the National Cancer Institute. I hardly think they were doing it for public relations.

Q. Well, you mentioned 50 or 60 million dollars was spent. Was that taxpayer money or tobacco money?

A. That was taxpayer money.

Q. Taxpayer money. What did it accomplish for the taxpayer, the 60 million of taxpayer money?

A. Quite a bit.

Q. Did you make a safer cigarette?

A. We certainly lowered the tar and nicotine levels of cigarettes as a result of some of that activity since then.

Q. You lowered --

A. We certainly explored many alternatives beyond that, again, trying to find products that would fare better in these bioassay systems.

Q. You lowered the tar, but you just told us that lower tar doesn't equate in any way with less hazardous.

So my question to you is: What did the $60 million of taxpayer money accomplish for the taxpayer or for the smoker?

MR. HEIM: Objection --

MR. ROSS: Objection, Your Honor.

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Mischaracterizes.

THE COURT: Overruled.

A. I think if you want to know what it accomplished, you can read the reports that came out of the Department of HEW regarding that activity.

I'm not sure I can recite everything that came out of the work. Nonetheless, it was applauded, I think, internationally as an outstanding program that led to a lot of useful information in terms of cigarettes and their properties, and bioassay systems.

It certainly demonstrated that they could not develop an inhalation model, which is certainly a surprise, if cigarette smoke is the causative agent.

So there was certainly useful information that came out of this and advanced the state of science. It didn't allow any great concrete conclusions about whether cigarette smoking was causative with respect to disease, because it was all based on animal models.

Q. Well -- and since the -- you're telling us the conclusion was, in the inhalation studies, you could not develop cancer in the animals.

Well, that was good news for the tobacco companies; not for the taxpayers.

A. Well, I don't know. If -- if there's another

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cause of cancer other than cigarettes, and this helps elucidate it, I think it would be good news for tobacco.

Q. Did they come up with any other cause?

A. No, they did not.

Q. Now, you say that the work of the Tobacco Working Group was applauded.

Well, Dr. Spears, it sure wasn't applauded by the man who was selected to run the National Institutes of Cancer in 1977?

A. National Cancer Institute?

Q. The National Cancer Institute, forgive me, in 1977. He just walked away. He said: Enough of this nonsense; it's over.

That was his attitude, the new guy who was appointed in 1977, correct?

A. That's true. But the people that were there before him, Andicott, Baker, and Roucher, who were all distinguished individuals, felt the other way.

Q. Did Lorillard ever -- we've heard testimony from some people, from Reynolds, about Premier, about Eclipse.

Did Lorillard, during your tenure, ever develop a completely new cigarette, test market a completely new cigarette, on the order of something

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like Premier or Eclipse?

A. No, we did not feel that we had developed anything that was likely to be acceptable to the consumer.

Q. Can you cite me any other business, any other industry anywhere in America, in the history of America, where 45 million people have voluntarily quit using a product they once used?

A. I'm sure --

Q. That's unique to the tobacco industry, isn't it?

A. Are you talking about products collectively with the tobacco industry?

Q. Yeah, where 45 million -- you accept that statistic, by the way, that 45 million people who once were smokers quit smoking?

A. Yes, I think --

Q. Over the years?

A. Something like that.

Q. Yeah. Not to the -- okay.

That's totally unique to the tobacco industry, isn't it?

A. I don't know.

Q. Well, can you think of any -- has anyone stopped -- 45 million people stopped driving cars or

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stopped drinking Coke?

A. Well, they've stopped driving certain kinds of cars.

Q. Yeah, but these 45 million people are not people that stopped smoking a certain kind of cigarette and went to another cigarette.

These are 45 million people who used the product and gave it up, are no longer smokers. And I'm asking you: Can you compare that to any other business or industry in the history of this country?

A. I'm not trying to be flippant, but I guess most of our population rode horses at one time, which they've given up for automobiles. And I think you can find other examples like that.

Q. You like that analogy?

A. I said I'm searching for an answer to your question.

Q. And that's the best you could come up with? Okay.

A. I'm thinking of products that have become obsolete.

Q. Okay. Can you give us an example of another industry, another business in the history of this country, who puts a warning on their product, puts a warning -- warning consumers, and doesn't stand behind

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it; when asked about it, says: You know, it's on our product. The government makes us put it on our product, but we don't believe it, that cigarette smoking causes lung cancer, heart disease, emphysema and may complicate pregnancy?

MR. HEIM: Objection.

MR. ROSS: Objection.

MR. KIRBY: Objection.

Q. Any other business?

THE COURT: I'm going to sustain the objection.

BY MR. ROSENBLATT:

Q. I want to try to understand your general conception of causation. The facts are these:

There is a 50-year-old man, has cirrhosis of the liver, and you learn that he's an alcoholic, and for the last 15 years he's had a fifth of vodka every day.

Would you, in your mind, accept: Well, the reason he got cirrhosis of the liver is because all those years of drinking? Or would you want to do some research for 10, 15 years?

MR. ROSS: Objection, Your Honor. It's repetitive, and I'll show you why if you want to go sidebar.

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THE COURT: Yes.

(The following proceedings were had at sidebar:)

MR. ROSENBLATT: I forgot that it was in the depo I read to the jury.

THE COURT: Yes.

MR. ROSENBLATT: I forgot. I'll take a lie detector test on that, that I forgot. I'll pass with flying colors.

MR. HEIM: No aspersions were made.

THE COURT: Okay. Let's move on.

(The sidebar conference was concluded, and the following proceedings were held in open court:)

BY MR. ROSENBLATT:

Q. Now, you were on the board of directors of the Council for Tobacco Research, right?

A. Correct.

Q. What are special projects?

MR. ROSS: Objection, Your Honor. Beyond the scope and repetitive for the same reason.

THE COURT: Yes, I think it is beyond the scope. Unless you have some serious --

MR. ROSENBLATT: Well, in his CV, which was --

THE COURT: Let's talk about it.

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(The following proceedings were had at sidebar:)

MR. ROSENBLATT: In addition to the objections -- I want to play the martyr here a little bit. In addition to their objections, every time we walk up here, the bleachers either -- the people not coming up here, Kirby was the most recent, is mumbling under his breath, and the people in the first -- it goes on constantly, and I just let it pass.

THE COURT: You're getting paranoid.

MR. MOSS: Kirby asked me if we're going to have dinner tonight, is what he asked me.

MR. HEIM: I hope you said no.

MR. MOSS: No, we are.

THE COURT: You also know he's watching.

MR. ROSENBLATT: He may very well have asked Mr. Moss if he's going to have dinner. Actually it's a good combo, Kirby and Moss.

THE COURT: The jury is sitting there.

The point is this. He didn't ask him any questions about special projects or CTR. He asked him -- he mentioned that he was on the board.

MR. ROSS: Actually, that was not even on direct. That was already on cross.

THE COURT: You're right. So it's really

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outside the scope. I don't know what you're talking about. It's really outside the scope. The only time it came up is when you asked him --

MR. ROSENBLATT: Judge, where I was going was to create conflict on special projects. He was going to tell you another story on special projects.

THE COURT: Another story?

MR. ROSENBLATT: Another story.

MR. ROSS: It's certainly beyond the scope of cross.

MR. ROSENBLATT: Can I ask him some Robin Hood questions?

THE COURT: Okay. Are we going to be with him longer?

MR. ROSENBLATT: I was thinking about that. I mean, if I -- if we go over into tomorrow, I would probably -- well, I've got -- you know -- I mean, quite frankly, I have a lot of questions from Hilts' book which --

THE COURT: I'll tell you what we ought to do, to be perfectly honest with you. We ought to break. You sit down tonight, reassess your position on this whole situation.

MR. ROSENBLATT: Okay. I won't be long. I won't be an hour and a half.

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THE COURT: The problem is, it's an unusual situation where he's already testified on deposition.

MR. ROSENBLATT: I've got to look at that.

THE COURT: It makes a difference. Besides which, I think we all need a break at this point.

MR. ROSENBLATT: While we're up here, I said to Mr. Heim at the lunch break, I said: You know, I was really surprised that David was as brief as he was. So I said to Mr. Heim, I said: If I spill over with him to tomorrow, I mean, it's not going to go to lunchtime. So what is the witness' situation?

MR. HEIM: And the answer --

THE COURT: You want to talk about this after?

MR. HEIM: Yes.

(The sidebar conference was concluded, and the following pr di s were held in open court:)

THE COURT: You know what, folks? I think we'll call it a day.

JUROR 16: I don't have school tonight.

THE COURT: You can stay. We're leaving. It's been one of those days, folks.

So I think what we need to do is just call it quits for today and relax, enjoy your evening. We'll come back tomorrow all fresh, bright, bushy-tailed and

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do what we have to do tomorrow. I think that's a better part of what we should be doing.

So the same rules would apply as far as you folks are concerned. Get here by 9:15, and we'll be underway at 9:30.

(The jurors exited the courtroom.)

THE COURT: Doctor, overnight, it's doubly important that you not discuss your testimony with anybody.

THE WITNESS: Fine.

THE COURT: I hope you have a pleasant evening, good dinner, relaxation; and we'll get you over with by, I'm sure, midday. At least that's what the plan is.

THE WITNESS: Fine. Thank you.

THE COURT: Thank you.

(Witness exited the courtroom.)

THE COURT: We have some business that we have to conduct. So if the witness will step out now.

(The witness exited the courtroom.)

THE COURT: All right. There's a couple of matters we left hanging.

MR. HEIM: Well, I --

MR. ROSENBLATT: Yeah, I had mentioned the witness thing. If I finish with Dr. Spears and

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redirect is done certainly by noon, you know, if not sooner, so I had said to Mr. Heim at lunch, I said: Now, you've listed one witness. You say he's coming Friday, and who is not going to be a long witness. Do you have any other witness that I should prepare for? And apparently no.

MR. HEIM: And that's correct, I don't, because the projection was that we would be two days with Dr. Spears. But we're going to be all right, because what we're going to do tomorrow afternoon is we actually have some depositions. So --

MS. ROSENBLATT: There's a little --

THE COURT: Are you rising to object?

MS. ROSENBLATT: Well, yeah. We had filed a motion to strike. There are designations from two experts, and this was argued and then put on the back burner, and then I filed as to a second witness, Dr. Pearlman. Let me backtrack a moment, and maybe we can address this right now.

Dr. Wanner is a pulmonologist at the University of Miami, and we had several pulmonologists. There was extensive argument to exclude pulmonologist after pulmonologist. Stanley at one point said we have Dr. Petty, I believe it was. I'll tell you what I will do. I will not call Dr. Wanner. So we did not call

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Dr. Wanner.

Then we get designations from his discovery deposition by the defense, so we moved to strike that, and said: Hey, this is our witness. You argued to keep him out. Now you're designating portions.

Now, they did that with Dr. Pearlman. Dr. Pearlman is a cardiologist. We had Dr. Holbrook and we had Dr. Grossman, who were cardiologists.

And arguments were made about repetitive, cumulative testimony. Stanley, at an argument, said: I won't call Dr. Pearlman.

A few days ago we get designations from a discovery deposition of Dr. Pearlman. We've moved to strike both of them. I don't believe that's an appropriate thing to do, to designate portions of an expert who is withdrawn because the defense argues that that expert is cumulative.

We had offered with Dr. Wanner, if you're going to designate him, then withdraw your objection. We'll call him on our case. And that was -- I mean, this -- this I just think is completely twisting the rule of our pretrial order, where a party argues that a witness is cumulative. And then when the witness is not called -- Your Honor admittedly did not make a ruling. Because when we put in our people, we said:

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Okay, we won't call him. He would be our third or fourth person that has a pulmonology background.

So our position is, A, he should be stricken; B, if Your Honor disagrees, it's their witness and then we'll cross designate.

If that's Your Honor's ruling, I will work on it tonight and cross designate portions of the deposition. But they can't have it both ways.

MR. ROSENBLATT: I had brought this up to you before, Judge, you remember.

MS. ROSENBLATT: And Pearlman just occurred a few days ago. So that's the second one. Wanner was back in October, I believe -- back in November. Back in November.

THE COURT: Okay. The issue boils down to prejudice?

MS. ROSENBLATT: Yes. Definitely.

THE COURT: And I'm thinking if you really wanted Witness A, and they, for whatever reason, were able to keep Witness A out and you weren't allowed to present it and they want to present Witness A, or at least certain parts of his deposition, which they probably could have presented had you presented Witness A as a cross designation, then if they're going to put the witness on for that designation, that would

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give you the right to put in anything that you wanted, cross designations or counter designations from their witness, which would turn the advantage back to you again, where you would get into evidence the same kind of testimony you would if you had it in your case as in the defense case. And where is the prejudice?

MS. ROSENBLATT: Well, the prejudice is it's a discovery deposition.

MR. HEIM: Well, Your Honor --

MS. ROSENBLATT: It's a discovery deposition taken by the defense.

THE COURT: You were going to put him on live?

MS. ROSENBLATT: Yes. There was argument made that Wanner was cumulative.

MR. KIRBY: No.

MS. ROSENBLATT: We had too many pulmonologists, too many cardiologists, so we pared down our list.

THE COURT: Is the deposition testimony any different than the live testimony will be?

MS. ROSENBLATT: Sure. We never asked him questions.

THE COURT: You didn't ask questions?

MS. ROSENBLATT: Yes. It was strictly

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discovery.

MR. HEIM: Your Honor, let me see if I can state it the way I remember. I don't think there was ever any argument made that Dr. Wanner was cumulative. I don't believe that argument was ever made by the defense.

I believe that plaintiffs had a decision to make whether to call Dr. Wanner or not. They made their own voluntary decision not to call him. Now, under the rules on the pretrial order and the rules of court, the rules, the Florida Rules of Order, we're entitled to designate the testimony of an expert. Either side can.

There is no distinction between a, quote, "discovery" deposition and a "trial" deposition. They would be entitled to cross designate, if it's a fair cross designation, for the designations that we make. And I'm sure that's what Mrs. Rosenblatt is referring to.

THE COURT: But the problem is --

MR. HEIM: We never made any motion to try and keep Wanner.

THE COURT: That's true on an ordinary witness, which you designate as your expert, or whatever. But the kicker here is it was their

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designated expert that you, for whatever reasons, kept out of their presentation.

MR. NEWSOM: Didn't keep out. They just chose not to call him.

THE COURT: Based upon some matter that came up?

MR. MOSS: No.

MR. ROSS: No, no --

THE COURT: Either objected to or a deal was made?

MR. HEIM: No, no,

MR. MOSS: No.

THE COURT: Why didn't they present it?

MR. MOSS: We don't know.

MR. HEIM: Because they decided they didn't want to expose him to cross examination.

MS. ROSENBLATT: That's not true, Your Honor. I'll have to bring in transcripts. When Dr. Petty was testifying: He's a pulmonologist; this is the third pulmonologist. We argued for about a half hour or so. I believe it was that hearing or another hearing where Stanley said: I'll tell you what I'll do. There is another pulmonologist on our list. They argued they've got Dr. Wanner coming up.

MR. KIRBY: No.

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MS. ROSENBLATT: I'll bring it in tomorrow.

MR. HEIM: Let's argue tomorrow. Counsel can bring in whatever she wants.

THE COURT: I remember we did have a discussion of how many pulmonologists can you call and it was decided we would limit it in this regard. Somewhere along the line we didn't call --

MS. ROSENBLATT: And we didn't call Wanner, and we didn't call Pearlman. He was another cardiologist. We had Grossman. We had a choice.

THE COURT: Because they objected to the number of pulmonologists.

MS. ROSENBLATT: Having more than one or two witnesses.

MR. MOSS: In all fairness, what occurred was you entered an order or Judge Postman entered an order, two per side. We raised that with Your Honor on a number of occasions, each time unsuccessfully. We raised it when Dr. Petty came here. We lost it because they said: Well, he's going to testify about this little area or niche. But we'll have a record tomorrow, and see what happens.

MS. ROSENBLATT: The problem is I have to then go through these lengthy discovery depositions and cross designate. If I should do that tonight, I'll do

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it. I know the issue came up in Broin, I believe with Dr. Spangler.

THE COURT: Well, let's look if you don't. If I rule that you don't have to because we're not going to let the witness testify, then what are we going to do?

MS. ROSENBLATT: They have a third one that they have. I'm getting you --

THE COURT: Who is that?

MS. ROSENBLATT: I forget his name. Cross designations. There is a third witness.

MR. HEIM: I believe that's Mr. Mikulay, and that's very short. The others are each about an hour long, and that one is a very, very short designation.

THE COURT: The other is only an hour?

MR. HEIM: Each is about an hour. So it would take up about two hours or two and a half hours.

MS. ROSENBLATT: I assume if Your Honor rules that they are permitted to, it would be their witness. It would not come out that we ever hired that witness. I believe that was Your Honor's -- we had a situation with Dr. Spangler. I don't recall what you did in Broin, but it was either excluded him or else it was their witness. You know, one or the other.

THE COURT: I'm trying to recall. There was

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a case, a recent case, that talked about using the other one's expert.

MR. MOSS: There is, except I don't know what it says.

THE COURT: Yes, I know there is.

MR. MOSS: But there is.

THE COURT: It came out recently.

MR. HEIM: Your Honor, they read the depositions of our witnesses.

THE COURT: Look it up.

MR. ROSS: Somebody will look it up.

THE COURT: You've got machines, people, all kinds of good stuff.

MR. ROSS: We'll snap our fingers.

MR. HEIM: As long as you recall that plaintiffs read the depositions of our experts in their case.

MS. ROSENBLATT: No. Tobacco industry representatives and employees.

MR. HEIM: I think there were experts as well.

MS. ROSENBLATT: They're adverse parties.

THE COURT: They can use an adverse party.

MS. ROSENBLATT: When you call someone, it becomes their party (sic) as a matter of law. They're

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not an adverse party.

THE COURT: Anyway, I want to be able to do something with this case. I don't want to sit here tomorrow and not have anything to do. And I don't want, you know, to be unfair to your side either, for that matter. But on the other hand, you won't be the first one that had to look through a couple of two-, three-hundred-page depositions, trying to figure out what's in, what's out. I did it.

MR. ROSENBLATT: Many times.

THE COURT: Many, many times. I suggest you go ahead and do it. Just be prepared.

MS. ROSENBLATT: Okay.

THE COURT: Okay. Because worse comes to worst, we just say no, and that will be it. Then you would have lost time and gained information. Okay?

MS. ROSENBLATT: Okay.

THE COURT: All right. In the meanwhile, I would like to see that case. There was a recent case about calling someone else's witness. But I'm not sure that was done without notice.

MR. HEIM: We'll try to find it.

Here is a corrected memo, Judge, by the way.

THE COURT: Oh, yes.

MR. HEIM: I have one for Susan. (Handing)

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THE COURT: That's on the JAMA article?

MR. HEIM: On the JAMA article.

THE COURT: I want to read that one before I decide anything on that, too. I'll read this over the night.

Okay. Any other way we can foul this case up?

MR. ROSS: We'll think of something.

THE COURT: You'll think about it. All right. Okay.

MR. ROSENBLATT: I was wrong. I have to confess error from yesterday. I learned that Errol Flynn was Australian, not English, and that was unintentional.

THE COURT: There was someone else who was Irish, not English.

MR. HEIM: Oscar Wild.

MR. ROSENBLATT: They all talk alike to me.

THE COURT: And Robin Hood really wasn't a thief.

MR. ROSENBLATT: He was --

THE COURT: Was not a thief, no.

MR. KIRBY: Waxman said he was.

MR. ROSENBLATT: No. Waxman never said he was.

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MR. MARTINEZ: He was the tooth fairy.

(Discussion off the record.)

(Court was adjourned at 4:45 p.m.)

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